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No. 10-

IN THE

# Supreme Court of the United States

RICHARD P. METTKE, PRO SE
*Petitioner,*

v.

DAVID KAPPOS, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the Court of Appeals for the Federal Circuit erred by holding the United States Patent and Trademark Office's conclusion of obviousness based on the combination of Exhibit E, Exhibit F, and Shah was correct and that it was based on findings supported by substantial evidence and not rebutted by objective evidence?

Whether the Court of Appeals for the Federal Circuit erred in denying the appellant the right to present oral arguments in support of his appeal in contradiction to the Constitution of the United States, Fifth Amendment right to due process?

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties here and in the proceeding in the U.S. Court of Appeals for the Federal Circuit are listed.

Petitioner here is Richard P. Mettke. The real party in interest is Richard P. Mettke.

Respondent here and appellee below is the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, David Kappos.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no corporate association. Richard P. Mettke is the only real party of interest

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RICHARD P. METTKE, PRO SE
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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The June 25, 2009 CAFC opinion affirming the Board of Patent Appeals and Interferences is at appendix 7a. The final mandate issued on August

24, 2009 and is at Appendix 1a. Mettke's request for a CAFC rehearing is at appendix 52a. The CAFC order denying a CAFC rehearing petition is at appendix 50a. The CAFC order denying unopposed oral arguments is at appendix 63a. Mettke's request for oral arguments is at Appendix 64a.

## JURISDICTION

The CAFC judgment of the U.S. Court of Appeals for the Federal Circuit was entered on June 25, 2009. A final mandate was issued on August 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

35 U.S.C. § 101 provides that "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."

35 U.S.C. § 101 provides that "any" new and useful process, machine, manufacture, or composition of matter may be patented, so long as the other requirements for patentability are met.

35 U.S.C. §103 (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject

matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made (abbreviated).

Fifth Amendment to the United States Constitution protects against abuse of government authority in a legal procedure. The due process of law or the process that is due is the principle that the government must respect all of the legal rights that are owed to a person according to the law. Due process holds the government subservient to the law of the land, protecting individual persons from the state.

## INTRODUCTION

This case raises the two very important questions relating to an exceptional pro se prosecuted patent appeal, whereas the CAFC egregiously erred in their decision regarding the affirmation of a USPTO reissue application; and whether Mettke was denied a fundamental right to due process as defined in the Fifth Amendment to the United States Constitution; the denial by the CAFC to allow for an oral argument during the prosecution of his appeal?

The Fifth Amendment to the United States Constitution protects against abuse of government authority in a legal procedure. Due process of law or the process that is due is the principle that the government must respect all of the legal rights that are owed to a person according to the law. Due process holds the government subservient to the law of the land,

protecting individual persons from the state.

Due process has also been frequently interpreted as placing limitations on laws and legal proceedings, in order for judges instead of legislators to define and guarantee fundamental fairness, justice, and liberty. This interpretation has often proven controversial, and is analogous to the concepts of natural justice.
It is a constitutional right for procedural due process, which has been broadly construed by the court to protect individuals so that statutes, regulations, and enforcement actions must ensure that no one is deprived of "life, liberty, or property" without a fair opportunity to affect the judgment or result. This protection extends to all government proceedings that can result in an individual's deprivation, whether civil or criminal in nature, from parole violation hearings to administrative hearings regarding government benefits and entitlements to full-blown criminal trials.

Mettke was clearly denied due process by the CAFC denying him the right to present oral arguments. The Fifth Amendment states that "Enforcement actions must ensure that no one is deprived of "life, liberty, or property" without a fair opportunity to affect the judgment or result." Mettke was wrongly denied a fair opportunity to present the facts of his case.

The Supreme Court has an obligation to ensure that the decisions of the CAFC are correct and proper in accordance with published codes, statues, laws and precedent. This is particularly important in the case of an independent inventor and pro se appellant. Mettke will clearly

demonstrate in the following pages that the CAFC marginalized his appellants brief in support of overturning a USPTO denial of a reissue application and that many of their supporting remarks were bootstrap and lacked any substantive analysis. The CAFC left unanswered many of Mettke's arguments and pretty much with an "air of arrogance" and bootstrap justifications affirmed the USPTO. Perhaps it was easier for the CAFC to dismiss without comment many of Mettke's substantive arguments, instead of thoroughly examining, analyzing and answering them. It is always easier to take the low road than the high road. This is not what the citizens of the United States should expect from a high level federal court that is expected to be "for the people".

This is the case to show that the Supreme Court has an interest in ensuring fair and proper justice is rendered; and there is indeed oversight and quality control of the decisions made by the CAFC.

The Supreme Court has stated in the past that oral arguments are left to the discretion of the judicial bodies reviewing a case and are not necessarily a denial of due process. The last major decisions (Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961) Mississippi River Fuel Corp. v. Federal Power Commission, 281 F.2d 919 (D.C. Cir. 1960)) made by this court regarding the right to oral arguments were made in the 1960's. The decisions in those cases were based on questions of "law". Because the arguments were based on "law", the court ruled oral arguments were not necessary.

In Mettke's case, one of the principle reasons for the CAFC's obvious decision was the interpretation of the Shah abstract that was posted on the World Wide Web; not a question of law. Mettke's request for oral arguments should have been granted.

This is the case that the Supreme Court should decide clearly and unambiguously, when the denial oral arguments are in fact a denial of the right to due process as prescribed by the Fifth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

### A. The Claimed Invention.

> A public on-line Internet terminal comprising: a central processing unit (CPU); a video display monitor coupled to the CPU; a keyboard for providing user interface coupled to the CPU; a credit card reader swipe device coupled to the CPU for accepting payment by a user; means for accessing the Internet and allow for user interaction; software installed into the CPU to allow interface with the Internet and credit card service centers; and a printer coupled to the CPU.

### B. Proceedings in the Patent and Trademark Office.

On January 23, 1995, Mettke applied for a patent directed to an "On-Line Communication Terminal/Apparatus." This application matured into the '905 patent, which issued on February 11, 1997 (Appendix 70a) with five claims, four of which were for a "public on-line, pay-as-you-use

communications terminal," and one for a method of using such a terminal.

On August 17, 1998, the appellant applied for reissue of the "905" patent pursuant to 35 U.S.C. §251. A prior USPTO appeal in this reissue application, Appeal 2006-0625, was decided August 31, 2006, in which the USPTO affirmed the rejection of claims 6-9 over 35 U.S.C. § 103(a), affirmed the rejection of claim 7 under § 112, first paragraph, for lack of written description, and entered a new ground of rejection of claims 6-9 under § 103(a). Mettke was informed that the new ground of rejection was not considered final for purposes of judicial review and then chose to reopen prosecution and filed a request for continued examination (RCE) on October 25, 2006. In the RCE, dependent claims 7-9 were cancelled and the sole independent claim 6 was amended deleting several limitations. The Examiner maintained the rejections in Appeal 2006-0625 with little discussion. Mettke filed an appeal to the USPTO on June, 29, 2007 (2008-0610). On September 30, 2008, the USPTO affirmed the Examiners decision.

C. The Federal Circuit's Decision

Mettke's unopposed request for oral arguments was denied by the CAFC. On June 25, 2009, the CAFC affirmed the decision of the USPTO based on written arguments. Denial of a request for a Panel rehearing was denied on August 22, 2009. Final mandate was issued on August 24, 2009.

In the CAFC opinion of June 25, 2009, the CAFC stated (appendix 7a),

> "Taking all of the evidence in its entirety, see In re Rinehart, 531 F.2d 1048, 1052 (CCPA 1976), the Board's conclusion of obviousness based on the combination of Exhibit E, Exhibit F, and Shah was correct, in that it was based on findings supported by substantial evidence and not rebutted by objective evidence. The decision of the Board, denying patentability of reissue application claim 6, is affirmed."

Mettke filed a request for a Panel rehearing on June 29, 2009. It was denied on August 17, 2009. Mettke filed for an En Banc rehearing on August 22, 2009. It was denied on August 24, 2009. Because of ambiguities in the United States Court of Appeals for the Federal Circuit Rules of Practice, dated May 1, 2008, Mettke misunderstood the requirement that an En Banc Hearing and Rehearing request "must "be requested as one motion. Mettke's view is that this is bureaucracy at its best. This is a case that has taken over 10 years to get through the USPTO and deserves the Supreme Courts immediate attention in the interest of fairness and justice.

## REASONS FOR GRANTING THE PETITION

### I. THE CAFC CLEARLY COMMITED GROSS ERRORS IN LAW, PROCEDURE AND JUDGEMENT IN THEIR AFFIRMITION DECISION OF THE USPTO, THAT CLEARLY MARGINALIZED METTKE'S WELL SUBSTANTIATED APPEAL BRIEF, AS WELL AS HIS PRO SE STATUS.

There are three areas where the CAFC clearly

committed errors in their decision as a matter of law, precedence and authority relating to obviousness, analogous art and secondary evidence of non-obviousness.

**Analogous art.** The CAFC affirmed the USPTO decision with the premise that although none of the proper relied on prior art accesses and interfaces with the Internet, the prior art presented was analogous. The relied on prior art was improperly entered in to the record. To be discussed later. The CAFC stated (Appendix 11a) that,

> "Mettke criticizes the Board's finding that the field of endeavor is "pay-for-use public communication terminals," arguing that this field was too broad and led the Board to consider non-analogous art. Mr. Mettke argues that the term "communication" broadly sweeps in such fields as facsimile machines, telephones, televisions, cellular phones, and global positioning systems. He contends that the field of his reissue application is limited in claim 6 to an "Internet terminal."..... is directed is "providing access to the Internet," but the USPTO found that the asserted prior art references are within the field of the invention or are analogous art. This finding is supported by substantial evidence".

There was no substantial evidence. In re Gartside, 203 F.3d 1305, 1316 (Fed. Cir. 2000), "Substantial evidence is something less than the weight of the evidence. The range of sources available, however, does not diminish the requirement for actual evidence.

That is, the showing must be clear and particular."

This was a boot strap argument by the CAFC. The Supreme Court rejected an agency's attempt to rely on its own expertise in a contested proceeding in Baltimore & Ohio R.R. Co. v. Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). None of the proper cited prior art by the CAFC accesses or interfaces with the Internet. The USPTO improperly inserted prior art material (Internet Navigator, Aliens, and On Haiti) in USPTO appeal decision 2006-0625, dated August 31, 2006. The prior art they added that was not in the "closed record".

This is clearly against precedence and authority. The USPTO cannot add additional evidence to the record, nor can they rely on their own technical expertise. In Brand vs Miller, 2006-1419, the ruled that under 5 USC 554 of the Administrative Procedure Act (APA), "if an agency adjudication is required by statute to be determined on the record after opportunity for an agency hearing," the adjudication becomes a formal proceeding, subject to the requirements of § 556 and 557 of the APA. 5 USC Sections 554, 556 and 557 require hearings to be held, impose detailed conditions for the creation of a written record and forbid ex parte communications"

The CAFC opinion was noticeably silent on these clear improprieties that were in Mettke's brief. These improprieties were not addressed. Possibly because Mettke was a pro se Appellant? Furthermore, the USPTO, pulled prior art back into the record that had been previously ruled out by the primary examiner as not being not being relevant (Exhibits C, D and L&G

ISDN) to the reissue application. The USPTO (BPAI) did not say why or how the examiner made an error in her determination. The USPTO cannot bring prior art back into the record and review it in the same context as the examiner without saying why and how the examiner erred. The examiner had reviewed this same material previously and ruled them out as prior art rendering Mettke's claims as obvious. In United States v. Chemical Found, Inc, 272, U.S. 1, 15 (1926), "Government officials are presumed to have "properly discharged their official duties." This was something that was totally improper and where the CAFC was noticeably silent in their opinion.

The CAFC clearly lacks an understanding of what substantial evidence means, which is disturbing because the CAFC's Chief Judge was on the Panel. While substantial evidence may consist of inferences, such inferences must be a product of logic and reason and must rest on the evidence; inferences that are the result of mere speculation or conjecture cannot support a finding. When something is ruled as substantive, the CAFC has the obligation to state how and why it is substantive. Throughout the CAFC opinion they just state that substantive evidence was provided by the USPTO and provides no how or why the evidence was substantive. Clearly bootstrap justifications and reasonings by the CAFC.

According to the CAFC (and USPTO) any communications apparatus with a function that allows for access the Internet would be analogousness with facsimile machines, telephones, televisions, cellular phone and global positioning systems (just to mention some of the areas). This broad area of definition would

stifle innovation and would invalidate thousands of patents. How could anyone get a patent in these areas? A more narrowed (and correct) field of endeavor would have been if any of the referenced prior art accessed the Internet. None did. How can they be analogous? Again, the CAFC just states that USPTO provided substantive evidence and provides no how or why the evidence was substantive.

There was no evidence other then the USPTO's improper insertion of prior art that was pulled back in to the USPTO decision. The USPTO also improperly added material (Internet Navigator, Aliens, and On Haiti) to the record, no mention of this was in the CAFC decision. Mettke has to assume that CAFC condones the USPTO adding material to a "closed record". Exhibits C, D and L&G ISDN prior art were previously reviewed by the Primary Examiner and it was determined they were not relevant to Mettke's reissue. They were reinserted into the record as a rejection (in combination) by the USPTO (BAPI). The USPTO (BPAI) gave no reason as to why the Examiners' decision for excluding this prior art was flawed or incorrect.

The USPTO cannot bring prior art back into the record and review it in the same context as the examiner without saying why and how the examiner erred when the same material was previously reviewed and ruled out as prior art rendering Mettke's claims as obvious. In United States v. Chemical Found, Inc, 272, U.S. 1, 15 (1926), "Government officials are presumed to have "properly discharged their official duties." The USPTO also improperly relied on their own flawed technical expertise. In Brand vs Miller, (2006-1419),

the court ruled that 5 USC 554 of the Administrative Procedure Act (APA), "if an agency adjudication is required by statute to be determined on the record after opportunity for an agency hearing, the adjudication becomes a formal proceeding, subject to the requirements of 5 USC 556 and 557 of the APA. Sections 5 USC 554, 556 and 557 require hearings to be held, impose detailed conditions for the creation of a written record and forbid ex parte communications"

The USPTO should have relied on what was in the record when making their decision. Going outside of the record and relying on their own technical expertise is further evidenced by the USPTO's use of Wikipedia (and citing it as an authority),adding material to the closed record, conducting research outside the record and then relying on their flawed technical expertise in their decision. This is clearly beyond their purview.

The rationales that are provided by the CAFC in their decision supporting the above actions are merely bootstrap and have no logical basis in fact (or they are silent). In Baltimore & Ohio R.R. Co. v. Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), "The Supreme Court rejected an agency's attempt to rely on its own expertise in a contested proceeding". As evidenced above, Mettke's substantive arguments were clearly marginalized by the CAFC. Their affirmation opinion clearly demonstrated a lack of legal analysis and logic on their part.

Had Mettke been allowed oral arguments by the CAFC, they would have had to justify their reasoning and rationale in the above areas. Their decisions were

noticeably silent in these areas. They do not address any of the improprieties stated above. It is a matter of case law and precedence that the USPTO cannot add anything to the closed record or rely on their own expertise. The USPTO actions above would be akin to a jury panel (or judge) sitting on a trial, after receiving all of the evidence in a case and deliberating on the case later saying, "we don't like the evidence that was presented and are going to find our own". Clearly this is improper.

**Obviousness.** The CAFC found Mettke's invention obvious when combining three references (Exhibits E & F in combination with the Shah abstract), two of which described protestor TouchNet's products, labeled "Exhibit E" and "Exhibit F". The CAFC stated in their decision (appendix 13a-14a ),

> "The Board found that Exhibits E and F disclose every element of claim 6 except the "means for accessing the Internet" and the "software . . . to allow interface with the internet and credit card service centers.....The Shah (abstract) mentions access to the Internet expressly and repeatedly, as the Board explained. Substantial evidence supports the Board's reading of the content of the Shah reference and its application, as analogous art, to claim 6."

The CAFC clearly marginalized Mettke's arguments in this area too and they failed to properly address them or were silent. Their arguments in support of the USPTO decision are clearly bootstrap. How the CAFC can say that the Shah abstract mentions access to the Internet expressly and repeatedly expressly is simply

beyond apprehension. The reasoning and rationale that the CAFC Panel, Chief Judge Michel, Circuit Judge Newman and Circuit Judge Lourie deduce that the Shah abstract teaches "accessing and interfacing with the internet" is a rubber stamp of the Patent Office's decision and lacks merit, substance, and analysis. Their decision is merely a cut paste from the BPAI decision; and by-the way, "we (the CAFC) consider this substantial evidence."

There is no substantial evidence. I believe that the CAFC with the help of the Supreme Court needs to relook at what they define as substantial evidence.

**The Shah abstract**. The Shah abstract was the principle reason for the CAFC's obviousness (in combination) decision. The CAFC said in its decision that the Shah abstract (appendix 2a) "explicitly and repeatedly" describes accessing and interfacing with the internet.

The abstract does not explicitly or expressly (or implicitly) teach accessing or interfacing with the Internet. Mettke agrees that the Shah abstract does discuss the internet. The discussion of the internet is not related to what his article is about; a kiosk based information systems with a World Wide Web design (a browser) used as an interface or browser. The Shah abstract is 4 ½ pages that needs to be read and interpreted as a whole, not just the first few introductory paragraphs.

The Internet is only mentioned <u>three times</u>, page 1, paragraph one and six and page 2, bullet two (appendix 2a and 3a.). Mettke's surmises that the interpretation

of "repeatedly" is open for debate. The mention of the Internet "three" times is most certainly not "repeatedly" in the context of a 4 ½ page abstract. In the Shah abstract, the Internet is only discussed in the context of it's the popularity on the web because of the web browser. I am not sure how the CAFC or anyone else for that matter can say the Shah abstract and the system he describes "explicitly, expressly or implicitly" teaches accessing and interfacing with the Internet. The Internet is only mentioned three times in his abstract. In the other ~four pages and ~20 paragraphs, Shah talks about his "stand-alone Information Kiosk system and web style browser".

The Shah abstract and the system he describes clearly and explicitly teaches "away" from accessing and interfacing with the Internet. The first paragraph of the "Shah" article calls out that the system that he is referencing is "kiosk based". The second paragraph talks about how the Internet's World Wide Web has provided the Internet with an easy interface. This sentence is in the context of discussing the World Wide Web "browser". The third paragraph talks about the Shah requirements that an information kiosk system based upon the World Wide Web "design" or "browser" must have. Hence, Shah clearly talks about a Kiosk-based information system "based "upon the World Wide Web in the "context "of a type of user interface or browser (emphasis added) to be used in a "standalone" kiosk information system. Not accessing or interfacing with the Internet.

The other four pages talk about the functions and operability of the Shah kiosk-based information system. These pages include detail about functions and operability of the Shah kiosk-based information system

to include: The Access Interface, Physical Requirements, User Interface Program, The Server, Storage and Transfer, Security and Control. Nowhere in these final four pages (appendix 3a-6a); the "meat" of the Shah Abstract and system description, is accessing or interfacing with the Internet mentioned.

In the Server paragraph it clearly and explicitly indicates that the kiosk-based system is on a closed network, not linked to the internet. In the aforementioned paragraphs and pages, Shah would have stated clearly that his system accessed and interfaced with the Internet if that was his intent. Shah does not mention accessing or interfacing with the Internet in these pages or paragraphs.

The Shah abstract should not have been used as a prior art rendering the Mettke's reissue application as obvious in combination with exhibits E & F. It does not expressly or implicitly teach accessing or interfacing with the Internet. As highlighted above, there is no substantial evidence supporting the CAFC decision.

Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." While substantial evidence may consist of inferences, such inferences must be a product of logic and reason and must rest on the evidence; inferences that are the result of mere speculation or conjecture cannot support a finding. The CAFC's logic that there is substantial evidence that the Shah explicitly and expressly mentions accessing or interfacing with the Internet in the same manner as Mettke's reissue application is clearly missing here!

Had Mettke been allowed oral arguments, the CAFC would have had to justify their interpretation, reasoning and rationale relating to their interpretation of the Shah abstract.

The CAFC states (Appendix 15a), "But the Board's analysis included more than a combination of disparate references disclosing different element, for the Board explained why Shah teaches the very combination of elements that Mr. Mettke sought to claim."

What the CAFC ignored and did not address in their decision was that when the USPTO reviewed the disparate references was how they reached their conclusion and what path they took. In C.R. Bard, 157 F.3d at 1352, 48 USPQ2d at 1232 (Fed Cir 1988), the court stated "Broad conclusionary statements regarding the teaching of multiple references, standing alone, are not evidence."; and In " ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 221 USPQ 929 (Fed.Cir. 1984) the court stated, "Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so and finally In re Fritch, 972 F.2d 1260, 23 USPQ2d 1780 (Fed.Cir. 1992), the court stated "the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification".

The above case law is particularly important since the CAFC relied on materiel and other items that the USPTO improperly added to the record. No mention of this substantial error of law and precedence by the USPTO is rebutted in the CAFC opinion. Again, the

CAFC clearly marginalized Mettke's substantive arguments and failed to properly address them. This is another area that Mettke could have addressed had he been allowed oral arguments. The CAFC stood silent instead of addressing them.

**Secondary Evidence of Non-obviousness.** The CAFC gave no weight to Mettke's arguments of secondary evidence of non-obviousness. This was clearly an error in law and precedence (or conflicting precedence). The CAFC again marginalized Mettke arguments and does not address them in their decision.

Mettke's principal arguments in this area were that the USPTO cannot pick and chose which case law to cite and follow. The CAFC inserts different case law on top of what the USPTO cites and does not elaborate why the case law that they use is precedential to the case law that the USPTO cites and that Mettke argues against. The CAFC states (Appendix 16a),

> "'The Board found that Mr. Mettke failed to establish a "nexus" between this asserted wide use and his invention. See In re Paulsen, 30 F.3d 1475, 1482 (Fed. Cir. 1994) ("When a patentee offers objective evidence of nonobviousness, there must be a sufficient relationship between that evidence and the patented invention."). We note that when the commercially successful device is the claimed invention itself, there is a presumption of nexus. See Demaco Corp. v. F. Von Langsdorff Licensing Ltd., 851 F.2d 1387, 1392 (Fed. Cir. 1988). However, the Board found that Mr. Mettke failed to meet his burden because he has not shown that

> the alleged commercial success is due to the claimed invention. We conclude that the evidence of obviousness was not, in this case, rebutted by the asserted commercial success".

In the USPTO decision (2008-0610), the USPTO cited case law, Ashland Oil, Inc. v. Delta Resins & Refrac., Inc., 776 F.2d 281, 306, 227 USPQ 657, 674 (Fed. Cir. 1985),

> "A nexus is required between the merits of the claimed invention and the evidence of secondary considerations in order for the evidence to be given substantial weight in an obviousness decision. The burden of proving a nexus is on the applicant. In the ex parte process of examining a patent application, however, the PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion that the sales constitute commercial success".

Mettke argued in his CAFC appeal brief that the USPTO argument should hold no weight. The rationale for most of the case law they referenced is that the USPTO does not have the resources to conduct the research to validate appellant's claims of secondary evidence of nonobviousness. The USPTO (BPAI), throughout the review of Mettke's BPAI prosecution took the time to conduct research outside the record, add material to the closed record (including citing Wikipedia as a reference and authority on many occasions). How can they then quote case law that says both, "The burden of proving a nexus is on the applicant' and "PTO lacks the means or resources to

gather evidence which supports or refutes the applicant's assertion".

Mettke pointed the USPTO to a couple of locations on the Internet where a nexus could be proved, as well as commercial success demonstrated. **You can't have case law both ways**. Since the USPTO took the additional time to research for other material to add to the record (Internet Navigator, Aliens, and On Haiti) and reference Wikipedia as an authoritative source, how can they and the CAFC cite case law that says it is up to the petitioner to prove his secondary evidence of non-obviousness arguments?

The CAFC did not mention anything rebutting the above in their opinion regarding Mettke's written arguments. Again, oral arguments would have made the CAFC address these points.

The CAFC stated (appendix 16a),

> "Taking all of the evidence in its entirety, see In re Rinehart, 531 F.2d 1048, 1052 (CCPA 1976), the Board's conclusion of obviousness based on the combination of Exhibit E, Exhibit F, and Shah was correct, in that it was based on findings supported by substantial evidence and not rebutted by objective evidence."

Mettke clearly proved beyond a doubt that there was not substantial evidence and that the purported evidence that the CAFC relied on (and where the CAFC was silent on in their opinions) was tainted and should not have been relied on in their opinion. No mention of Mettke's many well substantiated facts and evidence

that were in his CAFC Appellant Brief (appendix 17a) was addressed in the CAFC opinion. The CAFC in many cases cites case law, but fails to discuss or explain why the case and statues that they cite is precedential over the case law and statues Mettke cites (or the USPTO cited). They state many times throughout their opinion that something is substantive evidence, but do not disclose the how or why something is substantive. This was clearly a conflicting and tainted opinion.

## II. CERT. SHOULD BE GRANTED SO THE COURT CAN CLEARLY AND UNAMBIGOUSLY STATE WHEN A DENIAL OF ORAL ARGUMENTS IS A CONTRADICTION TO THE, FIFTH AMMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, RIGHT TO DUE PROCESS

Mettke's motion for oral arguments was unopposed by the USPTO. The CAFC denied the motion without comment. This is another clear example of the CAFC marginalizing Mettke's pro se appeal. Why should someone who is represented by counsel have the right to an oral presentation and a pro se appellant not? Mettke should been given the opportunity to present oral arguments on the merits of his case before the CAFC. This is was an exceptionally important case. Mettke prosecuted the initial issue of his "905" patent on his own. Mettke has been prosecuting the reissue case since 1999 and is fairly competent in patent law and prosecution (who would not be after over 10 years).

Mettke filed a six page motion requesting oral argument (appendix 64a) that was unopposed by the USPTO. His motion was denied without comment by the CAFC (appendix 63a).

Mettke's Patent is potentially worth more than 500 million dollars. Whether or not the CAFC felt that a Pro Se appellant could not present the facts of the case should not have mattered. The court has granted oral arguments to other Pro Se appellants, why not Mettke? Mettke's due process right shave been torpedoed and sunk. Litigants should have the opportunity to present their case fully to a court. Denial of this right, given the issues and complexities in this case was an abuse of judicial discretion and was violative of both the letter and spirit of due process. Cold words on a printed page are not the same as a live presentation. Mettke should have been given the opportunity for an oral argument.

Mettke's reissue case has been in the USPTO labyrinth for over 10 years. The USPTO has taken the prosecution down an improper path for over ten years. Mettke could have demonstrated and highlighted this in person during oral arguments. The Judicial Appendix was over 800 pages and was extremely complex and cumbersome. Mettke believes that had he conducted oral arguments, he could have quickly summarized the substantive evidence of the case and matters of law that could have resulted in the reversal of both the USPTO/CAFC decision.

The Fifth Amendment to the United States Constitution protects against abuse of government authority in a legal procedure. The due process of law or the process that is due is the principle that the

government must respect all of the legal rights that are owed to a person according to the law. Due process holds the government subservient to the law of the land, protecting individual persons from the state. Due process has also been frequently interpreted as placing limitations on laws and legal proceedings, in order for judges instead of legislators to define and guarantee fundamental fairness, justice, and liberty for all. This interpretation has often proven controversial, and is analogous to the concepts of natural justice.

It is a constitutional right for procedural due process, which has been broadly construed by the court to protect individual so that statutes, regulations, and enforcement actions must ensure that no one is deprived of "life, liberty, or property" without a fair opportunity to affect the judgment or result in proceedings. This protection extends to all government proceedings that can result in an individual's deprivation, whether civil or criminal in nature, from parole violation hearings to administrative hearings regarding government benefits and entitlements to full-blown criminal trials.

The Supreme Court has stated in the past that oral arguments are left to the discretion of the judicial bodies reviewing a case and are not necessarily a denial of due process. The last decisions made by this court regarding oral arguments that were related to due process were made in the 1960's. These decisions were based on questions of "law ". Because of this the court ruled an oral argument was not necessary.

In Mettke's case, in the matter of the Shah abstract, it was not a matter of law, but one of "interpretation".

One of the principle reasons for the CAFC's obviousness decision was the interpretation of the Shah abstract that was posted on the World Wide Web; not a question of law.

Mettke's request for oral arguments should have been granted. This is the case that the Supreme Court should decide clearly and unambiguously when the denial of oral arguments is in fact a denial of the right to due process as prescribed by the Fifth Amendment to the United States Constitution.

## III. THIS CASE IS A GOOD VEHICLE FOR RE-SOLVING THE QUESTIONS PRESENTED

This case presents the opportunity for the Supreme Court to address many exceptionally important issues relating to a pro se prosecuted patent appeal. Whether the CAFC egregiously erred in their decision regarding the affirmation of a USPTO reissue application? Whether Mettke was denied a fundamental right to due process as defined in the Fifth Amendment to the United States Constitution by the denial of the CAFC to allow for an oral argument during the prosecution of his appeal? The Supreme Court has an obligation to ensure that the decisions of the CAFC are correct and proper in accordance with published codes, statues, laws and precedent. This is particularly important in the case of an independent inventor and pro se appellant.

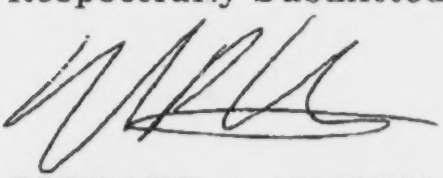
The CAFC left unanswered many of Mettke's written arguments and pretty much with an "air of

arrogance" and bootstrap justifications affirmed the decision of the USPTO. It is Mettke's belief that the Supreme Court has an interest in ensuring proper justice is rendered when presented by a Pro Se appellant; just as it would be if it had been presented by legal counsel. By reviewing this case the Supreme Court will show that it indeed has an oversight and quality control role in the decisions rendered by the CAFC.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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# United States Court of Appeals for the Federal Circuit

2009-1125
(Serial No 09/134,831)

IN RE RICHARD P METTKE,

## Judgment

ON APPEAL from the United States Patent and Trademark Office, Board of Patent Appeals

in CASE NO(S). Serial No. 09/134,831

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

**AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED JUN 2 5 2009

Jan Horbaly, Clerk

ISSUED AS A MANDATE: AUG 2 4 2009

**http://www.rtd.cordpeoplefraumtkiosk-paper.html**

# Suggestions for Information Kiosk Systems using the World Wide Web

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*The World Wide Web Information Kiosks Special Interest Group 30 April 1994*

## Abstract

Information kiosks provide users with access to community and local information is an easily understandable format They are designed to be used by the average user who has little or no experience with computer or information systems. Kiosk-based information systems are already available at a variety locations from airports to shopping malls to community information centers

World Wide Web has provided the Internet with an easy interface superceding access systems with its popularity and its capabilities The Web naturally lends itself to a distributed kiosk-based information system although there are special requirements for such a system that current Web clients and servers not provide

In this paper we examine the requirements that an information kiosk system based upon the World Wide Web must have before it can be widely accepted as a distributed information system for commercial and non-commercial needs

## Introduction

Kiosk-based Information system has many requirements to create the most-user friendly interface while maintaining security and functionality. *User friendliness* is the most important factor for a public access information system because of the nature of the majority of its customers as non-computer professionals. Other factors that must also be considered for these systems are the functionality and security of the servers.

**The Effectiveness of the World Wide Web as Kiosk-based Information System**

The first question that should be asked is why one would use the World Wide Web as a design for a kiosk-based information system. We have identified the reasons why the Web is ideally suited for this application:

- the Web has proven itself as a successful networked information system through its popularity on the Internet
- the Web is part of the Internet. This allows users access to the many services on the Internet.
- the ability of the Web to access other programs and services allows programmers to extend the capabilities of the server.
- the Web is a widely accepted standard as opposed to proprietary commercial multimedia systems which holds promise for its growth and development.

**Who will use these systems?**

The next question asks who will actually implement and who will use these systems There has been varied interest by commercial and non-commercial organizations in the World Wide Web. Currently there are several projects underway to develop a commercial version of popular Web browsers as well as commercial services for these browsers.

The following are some examples of who might implement such kiosk based information systems:

- Commercial, educational and governmental organizations who need to provide in-house information systems about their products and services For example hotels, amusement parks, shopping malls, etc.

- Communities and organizations who want to install public access booths to provide community information at key locations within the community, such as community information networks, University campuses, Airport authorities, etc.

- Commercial Information Referral organization who wish to provide a paid service through kiosks.

**The Access Interface**

The Access Interface comprises both the programs as well as the computer hardware necessary for a kiosk-based information system. This includes the Web browser or client program, the output hardware (the visual display unit,

a sound system, printing systems}, the input hardware (touch-screen systems, keyboards, fight-pens & stylus, keypads, etc), the kiosk-local processing hardware {if any), kiosk-local cache or information storage (if any), and the network connection hardware.

The user interface or Web browser will be accessed by the average user who may have very little or no experience with computer system. The user interface for a kiosk-based information system should be:

- Easy to use controls. Controls for the kiosk system should be understandable and easy to handle

- Easy to understand information display. The text or visual information should be easily readable and understood in content and form by the user.

- Access to contents should be as direct as passable. The user should have to go through as few steps as possible for to reach the information they require.

- Documents should be transferred in as short an access time as possible or present a failed message if the time to access the document is longer than a certain amount considered as infinity.

- The program interface should be able to return as to a default home page automatically when left idle for an extended period of time

- The physical unit should be reasonably secure to tampering or vandalism so as not to provide incorrect information.

- A minimal number of input devices so as not to confuse the user.

- Easy to use input devices such as a touch-screen or stylus based system

- The unit must be at an adequate height so that it is accessible by most people including handicapped users.

- The output devices should be easy to understand. Visual display output devices should be large enough to be read without difficulty by any type of user A sound system should be clear enough to be understood but not loud enough to offend.

- Security against vandalism or theft of the kiosk should be maintained
- A set of clear operating instructions for the booth must be displayed in some form on the physical unit of the booth to ensure usage.

**User Interface Program**

- Non-essential items such as buttons or menubars not directly related to the content of each page or not required for the correct usage of the system should not appear Such items may also give a user access to secure or incomplete areas of the Webspace.
- A common device such as a toolbar should always be present to provide users with a central control mechanism to the interface system. For example, users may wish to return to the home page or skip back to previously viewed pages. This device should be modifiable to the requirements of specific installations
- Support for internationalization and non-English languages and character sets.
- The program should be able to keep track of the history of documents accessed by the user. It should be able to understand different usage session's counting each session as one beginning from the home page. It should remove the history of access from previous sessions.
- It may be able to display graphics and movies and play digitized sounds and voice overs.
- It may be able to launch other programs to be presented upon the same output devices.
- There should be a diagnostic mode for servicing the program or the kiosk-local system.

**The Server.**

There are also suggested requirements for the Server program for these information kiosk systems Commercials organizations will most likely have

an invested interest in such information kiosk systems and may require that certain procedures should he followed by the servers for these systems.

Note that each kiosk may be a standalone system containing all the local information and with a link to the rest of the network. This would be a fast but costly system since the information requested the most often would be on local storage media This may also be difficult to implement and maintain if there is a large amount of data. However, it will reduce the cost of the network link if a non-permanent circuit or dial-up connection is used.

Each kiosk may in turn be a client only system which access the information over the network link from a remote server and caches the information locally. To transfer the information from the server down to the kiosk may take some time but it saves cost and reduces the maintenance. This may be expensive if network connect time charges are expensive

**Functionality**
The server should be able to access foreign databases which act as storehouses of raw data The server should be able to locate these databases and the information within with the least amount of processing or translation

The server should have good support for graphics and graphical enhancements. The concept of image maps are almost a must. Mapping between commands and images enhances the ease of use of system Also useful would be a reverse of the image map concept where a user selects an item or enters a piece of text and its corresponding image is displayed

**Storage and Transfer**
Since these kiosks may be located at remote sites, the problems of data storage, caching and transfer becomes important especially considering that the information has to be presented in a rapid and predictable manner

The problems of data storage are directly related to the actual implementation and hardware requirements of the system. Although no specific suggestions have been made as to the actual computer system required for a kiosk-based information system, the general trend is to use cheaper and cost-effective equipment to reduce the problems of theft, vandalism, or damage.

If the server and data is located locally, the kiosk would only require to use the network when accessing remote documents The kiosk-local computer system would not require a very large cache area since the documents can be accessed very rapidly.

If the server is located remotely more considerations come into play. The server must be able to respond and transfer documents in a limited amount of time over the network link. Servers might also be able to offload requests to other similar servers when they are too busy to respond. This suggests a form of server to server communication and load-balancing which is currently *not* a part of the HTTP specification. The data may require to be replicated across several storage systems and duplicate servers on other computer systems may be necessary as a failsafe measure to ensure constant access.

***Security***

Security of the server depends upon the type of implementation of the kiosk, whether standalone or remote server based. However, certain common elements exist in both, such as physical access to the serves computer system. Access to the console of the server should only be allowed to secure personnel to ensure the safety of the information

Network security is another issue. Access to the computer network that the servers are located on should be secure to reduce the chance of computer cracking or vandalism of the information. Since most servers run on common operating systems such as UNIXC, VMS, etc, operating system security is also a crucial element in the safety of the information.

Data managers should decide upon a protocol for operator access, updating and maintenance of the information since it can affect the lives of many others.

Another form of access is dependent upon the content of the documents A public system will not often restricted documents but data managers may wish to restrict certain areas of their Webspace dependent on their own restrictions

**Control**

Control involves the access to the Server and kiosk system for diagnostic examinations and also modification of the information space. Control is tied as very closely with security.

BEST AVAILABLE COPY

Operators and Data Managers may wish to log access to documents for statistical analysis Keeping accurate logs of document access can help administrators anticipate growth of the installation.

Each installation should be able to decide which URI's are accessible through their server. Some installations may decide that they do not wish to provide their kiosks with access to the "news" or "mailto" services.

Commercial organizations may also wish to charge customers for access to specific access to documents or services. The concept of registered users and billing may be built in to the server.

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NOTE: This disposition is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

2009-1125
(Serial No. 09/134,831)

IN RE RICHARD P. METTKE,

Richard P. Mettke, of Reynoldsburg, Ohio, pro se.

Raymond T. Chen, Solicitor, Office of the Solicitor, United States Patent and Trademark Office, of Alexandria, Virginia, for the Director of the United States Patent and Trademark Office. With him on the brief were Shannon M. Hansen, and Thomas L. Stoll, Associate Solicitors. Of counsel was Sydney O. Johnson, Jr., Associate Solicitor.

Appealed from United States Patent and Trademark Office Board of Patent Appeals and Interferences

NOTE: This disposition is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

2009-1125
(Serial No. 09/134,831)

IN RE RICHARD P METTKE,

Appeal from the United States Patent and Trademark Office, Board of Patent Appeals and Interferences.

DECIDED: June 25, 2009

Before MICHEL, Chief Judge, NEWMAN and LOURIE, Circuit Judges.

NEWMAN, Circuit Judge.

Richard P. Mettke appeals the decision of the Board of Patent Appeals and Interferences affirming the examiner's rejection of the sole remaining claim (claim 6) in his application for reissue of U.S. Patent No. 5,602,905. Ex parte Mettke, Appeal 20080610 (B.P.A I. Sept. 30, 2008) The Board concluded that claim 6 would have been obvious in light of any of several different combinations of references, and was therefore properly rejected under 35 U.S.C. §103(a). We affirm.

## BACKGROUND

On January 23, 1995, Mr. Mettke applied for a patent directed to an "On-Line Communication Terminal/Apparatus." This application matured into the '905 patent, which issued on February 11, 1997 with five claims, four of which were for a "public online, pay-as-you-use communications terminal," and one for a method of using such a terminal. The specification describes the field of invention as a terminal "capable of interfacing with all major commercial on-line services," '905 patent, col. 1, lines 8-10, and emphasizes that the "pay-as-you-use" aspect is new, stating in the Description of Prior Art that "there is no one device/apparatus that allows a user, to access, on a pay-as-you-use basis, a commercial on-line service on an interactive basis," and that providing such a "pay-as-you-use" terminal would enable access to on-line services in "such diverse locations as airports, hotels, business centers, libraries, hospitals, shopping malls and other locations as appropriate," id. col 1, lines 62-67. The Summary of the Invention lists several components that are combined to produce the communications terminal, and states that the invention allows users to "conveniently access commercial on-line services and the Internet at other locations other than from their fixed terminal at an office or home." Id col. 2, lines 5-13.

The Detailed Description of the Invention proceeds by reference to two figures. Figure 1 is a high-level schematic block diagram showing that the terminal connects to a credit card processing service center and to an on-line service provider through a telephone line Figure 2 illustrates the terminal itself, encased in a housing, comprising a monitor, a credit card reader, a keyboard, a printer, and a CPU. Details of how these elements interoperate to provide communications services are not provided, the specification stating, "Interconnection and operability of the components is not discussed in greater detail since the technology is well known in [the] prior art." Id. col 3, lines 1-3.

On August 17, 1998, Mr. Mettke applied for reissue of the '905 patent pursuant to 35 U.S.C. §251, submitting with his application a declaration stating that he believed the '905 patent to be "wholly or partly inoperative or invalid by reason of me claiming less than I had the right to claim." He stated that he had inadvertently omitted claims that recited "accessing the Internet" generally, rather than merely accessing "commercial online services." He proposed to cancel claims 1-5 and to

add new claims 6-9 directed to a communications terminal for accessing the Internet.

Three parties, including TouchNet Information Systems, Inc., filed protests to the reissue under 37 C F.R. §1.291(a), and provided several references not previously considered during prosecution of the '905 patent. The examiner then rejected the new claims, and the Board affirmed the examiner's rejections and also entered a new ground of rejection for obviousness. Mr. Mettke filed a Request for Continued Examination, amending claim 6 and cancelling claims 7-9. Claim 6, as amended, was as follows:

**6.** A public on-line Internet terminal comprising:
a central processing unit (CPU);
a video display monitor coupled to the CPU;
a keyboard for providing user interface coupled to the CPU;
a credit card reader swipe device coupled to the CPU for accepting payment by a user;
means for accessing the Internet and allow for user interaction;
software installed into the CPU to allow interface with the Internet and credit card service centers; and
a printer coupled to the CPU.

The examiner maintained the rejection of claim 6, and the Board again affirmed In a lengthy opinion, the Board concluded that claim 6 would have been obvious in light of five different combinations of references. Mr. Mettke appeals

## DISCUSSION

The question is whether the Board correctly concluded that, at the time Mr. Mettke filed his original application, the subject matter of claim 6 would have been obvious to a person of ordinary skill in the field of the invention. Obviousness is a legal conclusion based on underlying findings of fact. In re Thrift, 298 F.3d 1357, 1363 (Fed. Cir. 2002) The factual inquiries relevant to obviousness are set forth in Graham v. John Deere Co., 383 U S. 1, 17-18 (1966), and include (1) the scope and content of the prior art, (2) the differences between the prior art and the claims, (3) the level of ordinary skill in the relevant art, and (4) any objective indicia of non-obviousness such as commercial success, long felt need, and failure of others. We review the Board's factual

findings for support by substantial evidence, and the Board's ultimate conclusion of obviousness without deference. In re Gartside, 203 F.3d 1305, 1316 (Fed. Cir. 2000).

Mr. Mettke criticizes the Board's finding that the field of endeavor is "pay-for-use public communication terminals," arguing that this field was too broad and led the Board to consider non-analogous art. Mr. Mettke argues that the term "communication" broadly sweeps in such fields as facsimile machines, telephones, televisions, cellular phones, and global positioning systems. He contends that the field of his reissue application is limited in claim 6 to an "Internet terminal." However, the specification describes various communication media, including facsimile machines and email, as related to the invention. The Board recognized that the specific aspect to which claim 6 is directed is "providing access to the Internet," but found that the asserted prior art references are within the field of the invention or are analogous art. This finding is supported by substantial evidence.

The Board considered a combination of three references, two of which described protestor TouchNet's products, labeled "Exhibit E" and "Exhibit F" by the Board, plus an article by Rawn Shah titled "Suggestions for Information Kiosk Systems using the World Wide Web "

The Board found that reference Exhibit E describes a "free-standing pay-for-use TouchFax . . public communications terminal (kiosk) for locations such as airports, hotels, truck stops, and supermarkets," that provides services including "phone, fax, computer, word processing, copying, and information services." Board op. at 15. The Board further found that the terminal comprises "a microprocessor, a touch-screen monitor, a data port for modem and laptop connections, a full-size keyboard, and a laser printer," and that the terminal accepts payment "using credit card or other magnetic card such as a telephone calling card." Id.

The Board found that Exhibit F describes a "Public Communications Terminal from TouchFax, in a stand-alone housing including a telephone, speaker, touch-screen monitor, a credit card reader for payment of services, a full-size keyboard for computer database access or word processing, an option panel, a flatbed scanner, a 386 CPU, and a laser printer," which provides services including "telephone, send or receive a fax, photocopying, word

processing and laser printing, and access to a growing number of information databases from Wall Street news to international sports scores." Id. Apart from Mr. Mettke's assertion that these references are not relevant because they do not focus on the Internet, he does not challenge the Board's description of the content of the references.

The Board found that Exhibits E and F disclose every element of claim 6 except the "means for accessing the Internet" and the "software . . . to allow interface with the internet and credit card service centers " However, the Board found that the communications software discussed in Exhibit F would have suggested the use of such software to communicate between the credit card reader device that is shown in Exhibit E, and a remote credit card service center.

The Board found that the Shah reference teaches the addition of the sole remaining element "means for accessing the Internet." Shah describes "a kiosk based information system using the World Wide Web on the Internet as an interface." Board op at 22 (citing Shah, abstract). The Board explained that the World Wide Web is not identical to the Internet, but is a distributed collection of linked documents and functionalities that is accessible using the Internet, while the Internet itself is a collection of interconnected computer networks operable via a set of common protocols. The Board found that, contrary to Mr Mettke's argument, Shah explicitly addresses the advantages of using the Web as a means for providing information through a kiosk system, that "the Web is part of the Internet" and that it "allows users access to the many services on the Internet " Id at 23 (citing Shah at 1-2). The Board found that Shah describes the Web as a distributed information system, and not merely as a "browser" interface that can be used to present information on a terminal screen The Board noted that Shah includes a discussion of kiosks that may store specific information locally, and discusses how "data managers may wish to restrict certain areas of their Webspace dependent upon their own criteria." Id. at 25 (quoting Shah at 5).

Mr. Mettke argues, as he did before the Board, that the Shah reference does not disclose "accessing the Internet" at all He contends that the PTO "grossly misinterpret[ed] the Shah prior art," and that Shah "teaches away from accessing the Internet." Petr.'s Br. 6. He contends that Shah's discussion of the World Wide Web is limited to the use of a Web "browser" to access only limited information on a "standalone network," meaning one that is not connected to the larger Internet. The Board considered these contentions, and

rejected them based on the text of the Shah reference, finding that Shah plainly discloses an information kiosk that uses the "World Wide Web on the Internet as an interface." Board op at 22 (quoting Shah, abstract). Shah mentions access to the Internet expressly and repeatedly, as the Board explained Substantial evidence supports the Board's reading of the content of the Shah reference and its application, as analogous art, to claim 6

The Board concluded that the subject matter of claim 6 would have been obvious in view of the combination of Exhibit E, Exhibit F, and Shah. Mr. Mettke argues that the references do not contain any motivation to combine the "means for accessing the Internet" with the other elements of claim 6. Mr Mettke contends the Board engaged in hindsight analysis, using his patent as a blueprint for the combination of elements from various sources. Mr. Mettke is correct that the selective hindsight combination of references that show various elements of the claim generally does not suffice to establish obviousness. See KSR Intl Co. v. Teleflex Inc., 550 U.S 398, 418 (2007) ("[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.").

But the Board's analysis included more than a combination of disparate references disclosing different elements, for the Board explained why Shah teaches the very combination of elements that Mr Mettke sought to claim The Board found that Shah does not merely disclose "accessing the Internet" as a general matter; Shah expressly teaches Internet access in connection with information and communication kiosks—the kinds of public communication terminals described in Exhibits E and F. Shah provides explicit support for the Board's finding that a person of ordinary skill would have been motivated to modify existing information kiosks or terminals to provide access to the Internet We affirm that the Board established a prima facie case of obviousness.

Mr. Mettke argues that the Board improperly dismissed his evidence of secondary (objective) considerations rebutting the prima facie case of obviousness. He states that the '905 patent has been cited as prior art in 93 patents, which he states indicates that his patent was a technology leader. He directs us to commentaries stating that the number of citations is a "metric of patent quality and thus of innovation." We draw no generalization about the significance of citations, for we agree with the Board that in this case, where

every element of claim 6 is shown in the prior art, performing the same function as in the claim, along with a reference showing a reason to combine the elements, this prima facie case of obviousness is not rebutted by the number of citations alone.

Mr. Mettke also states that "over 50% of all [now-existing] kiosks have all of the elements" of claim 6, suggesting commercial success. The Board found that Mr. Mettke failed to establish a "nexus" between this asserted wide use and his invention See In re Paulsen, 30 F.3d 1475, 1482 (Fed. Cir. 1994) ("When a patentee offers objective evidence of nonobviousness, there must be a sufficient relationship between that evidence and the patented invention."). We note that when the commercially successful device is the claimed invention itself, there is a presumption of nexus. See Demaco Corp. v F. Von Langsdorff Licensing Ltd , 851 F.2d 1387, 1392 (Fed. Cir. 1988). However, the Board found that Mr. Mettke failed to meet his burden because he has not shown that the alleged commercial success is due to the claimed invention. We conclude that the evidence of obviousness was not, in this case, rebutted by the asserted commercial success.

Taking all of the evidence in its entirety, see In re Rinehart, 531 F.2d 1048, 1052 (CCPA 1976), the Board's conclusion of obviousness based on the combination of Exhibit E, Exhibit F, and Shah was correct, in that it was based on findings supported by substantial evidence and not rebutted by objective evidence. The decision of the Board, denying patentability of reissue application claim 6, is affirmed.

# BRIEF FOR APPLICANT-APPELLANT

## RICHARD P. METTKE

IN THE
COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 2009-1125

IN RE RICHARD P. METTKE

ON APPEAL FROM
THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Filed on: 12/26/08

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## IN RE RICHARD P. METTKE

## Appeal No. 2009-1125

### CERTIFICATE OF INTEREST

RICHARD P. METTKE, Pro Se certifies the following:

The full name of the party represented is: Richard P. Mettke

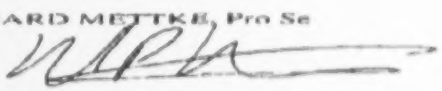
The name of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A

The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are: None

The names of all law firms and the partners or associates that appeared for the parties or amicus now represented by me in the trial court or are expected to appear in this court are: None

Date: 12/26/08

RICHARD METTKE, Pro Se



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5 U.S.C. § 554,554, 556, 557 16

**Other Authorities**

37 C.F.R § 1.304(a) iv

## STATEMENT OF RELATED CASES

There are no known pending cases which will directly affect or be directly affected by this Court's decision in the pending appeal.

## STATEMENT CONCERNING ATTORNEY

FEES No claim for attorney fees is involved in this appeal.

## STATEMENT OF JURISDICTION

This is an appeal from a decision of the Board of Patent Appeals and Interferences in the United States Patent and Trademark Office affirming the examiners rejection of the claims of a reissue application

for United States Letters Patent 5,602,905. The Patent and Trademark Office had jurisdiction over the examination of the Reissue application and the appeal from the Examiner's decision under 35 U.S.C. §§ 1, 6 and 7, and this Court has jurisdiction over the appeal from the Board's decision under 28 U.S.C. § 1295(a)(4)(A). The appeal is timely under 35 U S.C §142 and 37 C.F.R. § 1.304(a) because the filing of a notice of appeal was within two months after the Board's action affirming the decision on the appeal from the Examiner's action. The decision on the appeal was mailed September 30, 2008 and the notice of appeal was filed November 15, 2008

## INTRODUCTION

Mettke obviously picked the wrong patent enforcement strategy in 1998 for his 5,602,905 patent, issued on February 12, 1997. He made the strategic decision in July 1998 (filed for reissue on August 17, 1998) of going through a Patent Office reissue process rather than furthering his case in the federal court system during infringement proceedings. What the court will see in the following pages is a clear case of gross

*misinterpretation* of the "principal" relied on prior art (in combination), *Shah*. The court will see in the following pages that the Patent Office blue-printed and connected the dots of prior art to render Mettke's reissue obvious. The Patent Office unquestionably fell into the hindsight trap. The original patent application was filed on January 23, 1995; the state of the Internet and its uses was in its infancy. The court will see that the BPAI improperly and on numerous occasions entered new evidence in to the "closed" record. This approach is a two way street that should negate case law which the BPAI cites (in particular not giving any weight the secondary objective evidence of nonobviousness) There were — 50 pieces of prior art evidence in the record that were submitted by third parties during the reissue prosecution For the BPAI to add, as well as search for their own evidence and add to the record, supports Mettke's contention that they used hindsight and blue-printed his application to obviousness This brief will show that many of the Patent Office arguments and decisions are boot strap. The court will see that the BPAI in their decision improperly relied on their own flawed technical expertise

(Wikipedia references) rather than the record. The BPAI improperly pulled *prior art* back in to the case which had been reviewed and ruled out by the Examiner as prior art that would negate a reissue. This prior art was reviewed in the same *context* by the BPAI (Exhibits C, D and L&G ISDN console). The BPAI failed to say why and how the Examined erred in her review and decisions Mettke will cite case law and common sense to support these comments.

## STATEMENT OF THE ISSUES

- Whether the Patent Office erred in the obviousness conclusion is fully supported by a combination motivation of the prior art rejecting Claim 6 under 35 U S C. § 103(a) as unpatentable over Exhibit E, Exhibit F, and Shah.
- Whether the Patent Office erred in rejecting Claim 6 under 35 U.S C. § 103(a) as unpatentable over Exhibit C, Exhibit D, Exhibit E, Exhibit F, L&G ISDN console, Internet Navigator, Aliens, and On Haiti.

## STATEMENT OF THE CASE

### III. The Invention

The invention disclosed comprises a system for accessing and interfacing with the Internet using a credit card. The system includes a video display monitor coupled to a CPU, a keyboard for providing user interface coupled to the CPU; a credit card reader swipe device coupled to the CPU for accepting payment by a user for use of the terminal or her activity; means for accessing the Internet and allowing for user interaction; software installed into the CPU to allow interface with the Internet and credit card service centers; and a printer coupled to the CPU Below is figure 1 & 2 from Patent Letters, 5,602,905 as issued on February 12, 1997. A typical functional embodiment is schematically illustrated by block diagram form in FIG. 1. Numeral 2 generally indicates the Terminal device which is comprised of the monitor, keyboard w/mouse, central processing unit w/internal modem (14.4-28 BPS), integrating software, laser printer, credit card swiping device, telephone and telephone lines. Numeral 4 generally

indicates the credit card processing service/center. Numeral 6 generally indicates the local telephone node/switching node. Numeral 8 generally indicates the feeder/access nodes for the commercial on-line service/Internet provider. Numeral 10 generally indicates the servicing telephone line. A typical embodiment of the terminal is illustrated in FIG. 2. Numeral 10 generally indicates the housing for the terminal. Numeral 11 generally indicates the monitor. Numeral 12 generally indicates the credit card reader swipe device Numeral 13 generally indicates the keyboard Numeral 14 generally indicates the printer paper discharge chute. Numeral 15 generally indicates the location of the printer behind the terminals access door. Numeral 16 generally indicates the location of the CPU with internal modem behind the terminals access door. Numeral 17 generally indicates the location of the access door.

II. The Claims on Appeal

Claim 6, the sole claim, is reproduced below



Figure 1

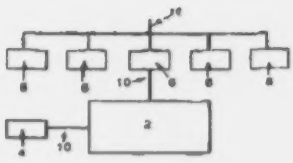
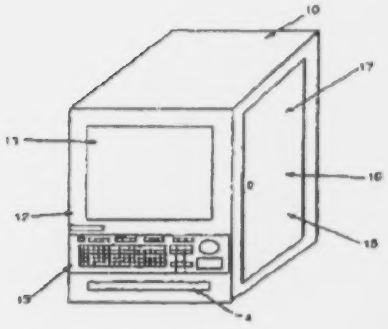


Figure 2



6 A public on line Internet terminal comprising: a central processing unit (CPU); a video display monitor coupled to the CPU; a keyboard for providing user interface coupled to the CPU; a credit card reader swipe device coupled to the CPU for accepting payment by a user; means for accessing the Internet and allow for user interaction; software installed into the CPU to allow interface with the Internet and credit card service centers; and a printer coupled to the CPU.

III. Proceedings in the Patent Office

A prior appeal in this reissue application, Appeal 2006-0625, was decided August 31, 2006, in which the BPAI affirmed the rejection of claims 6-9 over 35 U S.C. § 103(a), affirmed the rejection of claim 7 under §

112, first paragraph, for lack of written description, and entered a new ground of rejection of claims 6-9 under § 103(a). Mettke was informed that the new ground of rejection was not considered final for purposes of judicial review and then chose to reopen prosecution and filed a request for continued examination (RCE) on October 25, 2006. In the RCE, dependent claims 7-9 were cancelled and the sole independent claim 6 was amended deleting several limitations. The Examiner maintained the rejections in Appeal 2006-0625 with little discussion Mettke filed an appeal to the BPAI on June, 29, 2007. On September 30, 2008, the BPAI affirmed the Examiners decision.

## STATEMENT OF THE FACTS

This is an appeal from a decision of the Patent Office Board of Patent Appeals and Interferences, affirming the Examiner's action in rejecting the claim 6 of Mettke's Reissue application as being unpatentable for obviousness in view of the prior art of record. Mettke would also like to point out at this point that the BPAI in its decision (Appeal 2008-0610 & 2006 -0625) "added prior art" to the record that will be discussed in Arguments. The facts relating to the issues of obviousness (scope and content of the prior art, level of skill in the art, and the differences between the prior art and the invention, analogous art, field of endeavor

and secondary indicia of non-obviousness) are stated under headings II.A, II.B, II C, HD and II.E in the Argument section of this brief.

## SUMMARY OF ARGUMENT

The Patent Office erred in finding the invention of Claim 6 obvious in view of Exhibit E, Exhibit F in combination with *Shah*. The BPAI noted that the "principal" reason for the obviousness modification is based on Shah (page 44, BPAI appeal 2008-0610) in combination. The Patent Office continues to *grossly misinterpret* the *Shah* prior art. Mettke vehemently maintains that the Shah *teaches away, from accessing* the Internet The *Shah* art should not be used as a prior art rendering the applicants application as obvious in combination with exhibits E & F. The Shah abstract *does not* teach accessing the Internet. The *Shah* teaches using a "World Wide Web" type *browser* on a *standalone* network. The *Shah* article teaches using a *"World Wide Web style browser"* on a standalone or networked (not to the Internet). It teaches *away* from accessing the Internet. The Patent Office is clearly "reading a book by its cover" or in this case, the title of the *"Shah"* prior art, "Suggestions for Information Kiosk Systems using the World Wide Web". Mettke provided

almost 6 pages of analysis of the *Shah* article in his BPAI appeal (2008-0610) and shall not repeat them here, other than a few highlights. The entire *Shah* abstract (4 1/2 pages) needs to be read and interpreted as a whole, not just the first few introductory paragraphs. It is clear that the *Shah* teaches "away" from accessing the Internet, and only wants to use the *"Interface or web browser"* popularized on the Internet in the stand-alone Kiosks he describes. The first paragraph of the *"Shah"* article calls out that the systems that he is referencing are *"kiosk based"* The second paragraph talks about how the Internet's World Wide Web has provided the Internet with *easy interface* (emphasis added). The third paragraph talks about the requirements that an *information kiosk system based* upon the World Wide Web must have Hence, it talks about a Kiosk-based information system "based "upon the World Wide Web in the "context "of a type of *user interface* (emphasis added) to be used in a "stand-alone" kiosk information system, *not* accessing the Internet. The other 4 pages talk about the functions and operability of the *"Shah"* kiosk-based information system. These pages include detail about functions and operability of the "Shah" kiosk-based information system to include *The Access, Interface, Physical Requirements, User Interface Program, The Server, Storage and*

*Transfer, Security and Control* Nowhere in these pages, that are the "meat" of the *"Shah"* article is access to the Internet mentioned In the BPAI decision (20080610), page 27 & 28, the Patent Office strains to explain its interpretation and erroneously and improperly relies on its own technical **expertise. In the BPAI decision they state "However, *Shah* never indicates that the Web browser** is not connected to the Web or Internet". On the contrary, on page 4 *(Shah,* "Security")·

> "Security of the server depends upon the type of implementation of the kiosk,
>
> whether *standalone or remote server* based. However, certain common elements exist in both, such as physical access to the servers computer system. Access to the console of the server should only be allowed to secure personnel to ensure the safety of the information Network security is another issue
>
> Access to *the computer network that the servers* are located on should be secure to reduce the chance of computer cracking or vandalism of the information. Since most servers run on common operating systems such as UNIXC, VMS, etc, operating system security is also a crucial element in the safety of the information."

This paragraph clearly and explicitly indicates that the kiosk-based system is on a *closed network, not the internet* as the Patent Office implies. Otherwise, *Shah* would have stated clearly that his system accessed the Internet Furthermore, the BPAI quotes that *"Shah* states that each kiosk is

connected to a network *(Shah,* "The Server," p 3), which indicates that the kiosk is not a self-contained information system". In the same paragraph, *Shah* states that "each kiosk may be a *standalone system* containing local information and with a link to the rest of the network. (Emphasis added)". Mettke unequivocally maintains that *"Network" means a closed system,* with servers that have databases, *not the Internet.* Otherwise, *Shah* would have explicitly stated that his system accessed the Internet The BPAI mentions that, *"Shah* states that "[t]he server should be able to access foreign databases which act as storehouses of raw data" *(Shah,* "Functionality," p. 4), which, taken in conjunction with the description of the use of the Web, indicates that the data is accessed over the Internet." The BPAI's reasoning is definitely flawed and erroneous. The Patent Office pulls in words from *"Shah's"* introductory paragraphs to try and get the "functions and operability" of the *Shah* system to mean what they want it to mean If access to the Internet is what *"Shah"* wanted the article to say, that's what he would have explicitly said. The BPAI says, "Here the *Shah* also states that "data managers may wish to restrict certain areas of their Webspace dependent upon their own criteria" (Shah, "Security," p. 5) and the Appellant has not said what "Webspace" can refer to other than a Web site on the Internet" Again, this is another case of the BPAI erroneously inserting it technical

expertise. Webspace in the context of the *Shah* Article *means* what appears on the kiosk screen, the user interface, what the user sees on the screen. Remember, the gist of the *"Shah"* article (page 2, The Access Interface) was to put a user friendly screen on his Kiosks that is based on the World Wide Web Interface. The BPAI quotes the *Shah* article; "Each installation should be able to decide which URI's are accessible through their server. Some installations may decide that they do not wish to provide their kiosks with access to the 'news' or 'mailto' services." *(Shah,* "Control," p. 5). The BPAI states that the reference to URIs (Uniform Resource Identifiers) in this paragraph indicates access to the Web on the Internet and indicates that the data is accessed over the Internet." This is a flawed argument and demonstrates the BPAI's lack of technical expertise [1]Wikepedia states,

> "In computing, a *Uniform Resource Identifier (URI)* is a compact string of characters used to identify or name a resource on the Internet. The main purpose of this identification is to enable interaction with representations of the resource over a network, *typically* the World Wide Web, using specific protocols. URI's are defined in schemes defining a specific syntax and associated protocols".

As is noted in the above description, a URI is *typically* used to enable interaction with the World Wide Web The opportune word here is *"typically"*. URI's,(2) even today can allow for interaction and identify other resources besides the World Wide Web. This can include finding resources on closed Networks such as Wide Area Networks (WAN) or Local Area Networks (LAN) just to name a few. This was particularly the case in the 1980's and 1990's The BPAI interpretation is a case of relying on its own flawed technical expertise. It is clear that the BPAI failed to read the entire paper in its proper context and was straining (or stretching) to make the

*"Shah"* article say what they wanted to it to say *Shah* was the *primary* reason for the rejection of Mettke's claims in combination with exhibits E& F. The Mettke claims were further rejected as obvious by the BPAI over Exhibit C, Exhibit D, Exhibit E, Exhibit F, L&G ISDN console, Aliens, and On Haiti by the BPAI. Internet Navigator, Aliens, and On Haiti Internet Navigator, were *added* to the record by the BPAI. Exhibit C, Exhibit D, Internet Navigator, were added to the record by the BPAI. This prior art

1 http://en.wikipedia.org/wiki/Uniform_Resourceidentifiers

was reviewed by the Primary Examiner and was not relied on as prior art rendering Mettke's application obvious. The BPAI reviewed this prior art in the same context as the Examiner and pulled them back in to the record as part of their obviousness rejection They did not state why the Primary Examiner was in error in her analysis. The BPAI erroneously gave no weight to Mettke's "secondary evidence" of nonobviousness stating case law that allegations of "unexpected results" are not sufficient to show nonobviousness. The BPAI stated case law, "A nexus is required between the merits of the claimed invention and the evidence of secondary considerations in order for the evidence to be given substantial weight in an obviousness decision. The burden of proving a nexus is on the applicant. In the ex parte process of examining a patent application, however, the PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion that the sales constitute commercial success". This BPAI argument should hold no

weight. The BPAI, throughout the review of Mettke's reissue prosecution took the time to conduct their own research outside of the record and insert it into the record. How can they then quote case law

that says both , "The burden of proving a nexus is on the applicant' and "PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion" Mettke also provided another item of secondary evidence of nonobviousness in his appeal (2008-0610) to which the BPAI gave no weight. Mettke had stated that his "905" Patent is referenced as prior art in 81 (now 93) issued patents which definitely points to nonobviousness The BPAI could have easily went to Wikipedia, conducted an Internet search or other research (as they have done many times throughout this reissue prosecution) to validate and find authoritative evidence that the number citations of a patent as prior art is an indicator of a patents innovation and importance as a technology leader and a measure of commercial success. [2] In Wikipedia,"Citation Frequency- Modern scientists Baruch Lev and other advocates of accounting reform consider the *number of times a patent is cited* to be a *significant metric of patent quality and thus of innovation."* There are numerous other authoritative sources that support Mettke's contentions that could have been found with a simple Internet search. For brevity purposes, only one other authoritative paper is provided; "Direct Validation of Citation Counts as Indicators of

Albert, M.B., D. Avery, F. Narin and P. McAllister, 1991, Department of Economics, Institute for Business and Economic Research, UC - Berkeley. The paper is cited by numerous federal agencies such as the National Science Foundation and Office of Naval Research to name a few, as an "authoritative source". In another BPAI argument not giving any weight to secondary weight of nonobviousness, the BPAI states that Mettke "does not provide any evidence to back up his statement that the majority of these kiosks employ elements of the appellant's claims. Appellant has not provided the necessary nexus between the commercial success and the merits of the claimed invention." Here too, the BPAI had the time and researched on its own to add evidence to the record, they cannot say that "the burden of proving a nexus is on the applicant." They clearly opened up the door that required them to conduct additional research since they took the time to research and add evidence to the record. And then they cite case law saying that the burden is up Mettke to prove a nexus. This is clearly a case of pick and chose which case law the BPAI wants to use and cite. They could have conducted an internet search or went to Wikipedia and entered "Internet Kiosk" and found that over 50% of the kiosks have all of the elements of Mettke's claims. They would have found Mettke's claims in

support of secondary evidence of nonobviousness were accurate and should have been given weight. Additional secondary evidence of nonobviousness previously provided by Mettke (BPAI appeal 2008-610) that was not addressed by the BPAI was the *failure of others* Prior to the applicant's January 1995 disclosure, no entity had produced a terminal that contained all of the elements of the applicant's claims The examiner stated in an office action, dated 08/25/99 (page 4, line 5-17) that the majority of the references that the BPAI cites as obvious, were not invented prior to the applicant's disclosure. Third parties had claimed that Exhibits C, D, E, F and G demonstrated that they made public the subject of the patent. The Primary examiner ruled that they were not invented, unequivocally prior to January 1995. That alone should have pointed to unobvious. This also should have ruled out any of BPAI's use of these references to render Mettke's claims as obvious. The BPAI did not state that the examiner erred. Further unequivocal evidence of the *failure of others* were the statements by Mr Toughey, the owner of Touchfax, the company that the BPAI cites as prior art *(Exhibits C, D, E and F)* rendering Mettke's claims obvious stated. In a deposition , he states that his companies terminals and exhibits did not have

the capability to access the Internet prior to the date of the applicant's disclosure in *January 25, 1995* He also goes on to state that as of the date of his deposition, *June 16, 1998, no* Touchfax terminals had the capability to access and interface with the Internet. This is almost *3'/2 years after* Mettke's disclosure. The BPAI did not state why these statements were not given any weight in either of their two decisions. The BPAI says that a person skilled in the art would have known how to put all of the pieces of prior art together as in the Mettke claims But they misstate the analogousness and field of the endeavor of the prior art They did not state why the Examiner was in error when she reviewed the prior art in the same context as the BPAI, and then brought the prior art back in to their decision. The BPAI conducted additional research and brought new evidence in to the closed record and relied on their own flawed technical expertise, which is beyond their purview, in order to blue print Mettke's application to obviousness. The only basis for the combination of the prior art of record comes from Mettke's own disclosure. The Patent Office cannot create motivation. This is a clear case of impermissible hindsight reconstruction.

## ARGUMENT

I. Standard of Review Obviousness of the claimed invention under 35 U.S.C. §103 is a question of law which is reviewed de novo, Minnesota Mining and Manufacturing v. Johnson & Johnson Orthopedics, Inc., 976 F.2d 1559, 1572, 24 USPQ2d 1321, 1332 (Fed. Cir. 1992), "although the underlying factual inquires (e.g , the scope and content of the prior art, level of ordinary skill in the art, and differences between the prior art and the claimed invention) are reviewed under the clearly erroneous standard." In Hybritech v Monoclonal Antibodies, Inc., 802 F.2d 1369, 1379-80, 231 USPQ 81 and Graham v John Deere Co., 383 U S. 1, 13-14 (1966), "The ultimate determination of whether an invention would have been obvious is a legal conclusion based on underlying findings of fact." In re Dembiczak, 175 F.3d 994, 998 (Fed Cir. 1999), "We review the Board's ultimate determination of obviousness de novo. Id. However, we review the Board's underlying factual findings, including a finding of a motivation to combine, for substantial evidence" In re Gartside, 203 F.3d 1305, 1316 (Fed Cir. 2000), "Substantial evidence is something less than the weight of the evidence. The range of sources available, however, does not diminish the requirement for actual evidence. That is, the showing

must be clear and particular", C.R Bard, 157 F 3d at 1352, 48 USPQ2d at 1232, " Broad conclusionary statements regarding the teaching of multiple references, standing alone, are not evidence." The BPAI cannot add additional evidence to the record, nor can they rely on their own technical expertise. In Brand vs Miller, 2006-1419, ruled that Under § 554 of the Administrative Procedure Act ("APA"), if an agency adjudication is "required by statute to be determined *on the record* after opportunity for an agency hearing," the adjudication becomes a formal proceeding, subject to the requirements of §§ 556 and 557 of the APA. 5 U.S.C. § 554. Sections 554, 556 and 557 require hearings to be held, impose detailed conditions for the creation of a written record and forbid *ex parte communications.* 5 U.S.C. §§ 554, 556-557. In Gartside, "[i]n appeals from the Board, we have before us a comprehensive [factual] record . . including all of the relevant inform- tion upon which the Board relied in rendering its decision " In "Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). The Supreme Court rejected an agency's attempt to *rely on its own expertise in a contested* proceeding in Baltimore & Ohio R.R. Co. v. Sangamon Valley Television Corp v. United States, 269 F.2d 221, 224 (D C. Cir. 1959). The BPAI cannot

bring prior art back into the record and review it in the same context as the examiner without saying why and how the examiner erred when the same material was already reviewed and ruled out as prior art rendering Mettke's claims as obvious In United States v. Chemical Found, Inc, 272, U.S. 1, 15 (1926), "Government officials are presumed to have "properly discharged their official duties."

II 35 U.S.C. § 103 REJECTIONS

A. Scope and Content of the Prior Art. The Board's description of the scope is that the disclosed field of endeavor appears to be best defined as pay-for-use public communication terminals because the "905" patent discloses a pay-for-use public access terminal for communicating with commercial online service providers and Internet providers and *because* the "905" patent application as originally filed also disclosed that the terminal would send and receive facsimiles and e-mails. The particular problem with which Mettke was concerned in claim 6 was a pay-per-use public communication terminal for providing access to the Internet. Mettke's description, which is what was issued as Patent letters, 5,602, 905, and prosecuted as this reissue application, is better described as an "Internet

terminal or kiosk " The Board improperly assumes that because the title is "On-line Communications Terminal" that the issued Patent and Reissue application fall in to the broad scope and art of "communications". The Board also looked at the application as filed in January 23, 1995 and attempts to bring in other communication art that is outside of the scope of Mettke's *issued* "905" patent and reissue application. They insist that facsimile art and ISDN art are the same as Internet art and then piece together prior art to render Mettke's claims obvious. The BPAI arguments are mixing apples and oranges. Mettke stated in his appeal brief (2008-0610) "that field of endeavor as "pay-per-use public communication terminals is too broad because communications relates to many sub areas, facsimile machines, telephones, televisions, cellular phone and global positioning systems just to mention some of the areas. A more narrowed (and correct) field of endeavor would have been Internet " The BPAI responded that Mettke's arguments define the field of the inventor's endeavor much too narrowly.

This is a bootstrap argument. Why are the scope and the field of endeavor as Mettke stated to narrow? Their arguments would say that any use of Bluetooth technology is analogous and in the same field of endeavor as wireless Internet technologies Many more examples could be provided. The BPAI goes on to

say "A public pay-for-use terminal having Internet access is within the broad field of endeavor of pay-for-use public communications terminals." This is another bootstrap argument. The BPAI fails to state a couple of critical items that are missing from their arguments; the how and why Mettke's rational is flawed. They just say it is. The prior art that the BPAI uses in combination is *Shah* discloses a kiosk based information system using a World Wide Web *like* "interface" on a standalone system (abstract). *Exhibit C* is a video tape recorded May 14, 1993, and distributed by TouchFax Information Services as advertising at the May 1993 and Exhibits C-1 to C- 6 are printouts of selected video frames. The video tape advertises TouchFax kiosks for a variety of purposes including pay-per-use access to the Prodigy online computer services and purportedly the Internet. *No Internet.* Exhibit D is a diagram teaching use of a TF750 Public Terminal as a data and communications system. *No Internet.* Exhibit E discloses a free-standing pay-for-use TouchFax TF750 public communications terminal (kiosk) for that includes phone, fax, computer, word processing, copying, and information services. *No Internet* Exhibit F discloses a "TF700 Public Communications Terminal from TouchFax," in a stand-alone housing including a "computer database access or word processing," an option panel, a flatbed scanner, a 386 CPU, and a laser printer Services

include "telephone, send or receive a fax, photocopying, word processing and laser printing, and access to a growing number of information databases from Wall Street news to international sports scores." *No Internet The Internet Navigator* is a publication *inserted into the record by the BPAI* It describes that the Internet is a network of networks, which is made from computers and cables. The *L&G ISDN* console describes a free-standing ISDN payphone capable of accessing Videotex services available to the general public.

This prior art was reviewed by the Primary Examiner and was determined not to be relevant to Mettke's reissue. It was reinserted in to the record as a rejection (in combination) by the BPAI. The BPAI gave no rationale as to why the Examiners' rational for excluding it was flawed or incorrect *No Internet. On Haiti* describes that "'Cyberia' -- a 'cyberspace cafe' -- has opened recently in central London offering coffee, cakes and connection to the Internet. Connect charge: 1.95 British pounds per half-hour " This was prior art that was *inserted* in to the record by the BPAI. Mettke questioned its use as prior art to negate patentability, as it was an article of 26 words The BPAI stated that Mettke had cited no

authority or case law that said that prior art could not be applied that only had 26 words. Mettke would like to state common sense as case law on this one. I will also like to restate my earlier response, "Using the BPAI rationale, someone could have read an article on the internet or in a newspaper that says "man sells cold soda at his house" and negate all of the patents that have been issued relating to vending systems. Many more similar examples could be provided. The BPAI states, "Exhibits C, D, E, F, L&G ISDN console, and On Haiti relate to pay-for-use public communication terminals and are at least within the inventor's field of endeavor". This is a boot strap argument. The BPAI provides some generalities and opened ended remarks to come to that conclusion that seem to make sense only them. The court can see throughout this case that the Board applied its own expertise and inserted other material/evidence in to the closed record. The Board substituted its own expertise for record evidence. The Board's finding that an artisan would have known how to put together all of the elements of isolated pieces of prior art to render the Mettke claims obvious is at best a case of blue printing The detailed nature of the findings that the Board found necessary to render the Mettke claims obvious demonstrates the inappropriateness of its approach (a 50 page decision and combining 11 pieces of prior art [three different

ways]) Finally, the path that the Board determined that a skilled artisan would take under such circumstances was not supported by *substantial* evidence in the "closed record". The board determined that sending an email through Prodigy or other Commercial On-Line Service was accessing an interfacing with the Internet.

The BPAI stated that Touchfax's prior art was the level of art at the time and an artesian would have came to an inference to combine the prior art (in addition to what the BPAI inserted in to the record). Mettke maintains that the art and skill level of the artisans was not as succinct or ordinary at the time of Mettke's disclosure as the BPAI has stated. The BPAI heavily weighted the Touchfax prior art as current state and level of ordinary skill in the art Mettke maintains that the ordinary level of those skilled in the art at would not have combined the prior art as suggested by the BPAI, unless they saw his disclosure. This is *evidenced* by the fact that the owner of Touchfax states that *as of the date* of his deposition, June 16, 1998, *no* Touchfax terminals had the capability access and interface with the Internet. This is three and a half years after the applicant's disclosure on *January 23, 1995.*

A. Differences Between the Prior Art and the Invention

As the Examiner and the Board have acknowledged, Mettke's invention differs from the prior art as show in the aforementioned relied on prior art. The examiner and the Board agreed that none of the prior art items listed all of the elements of the Mettke's claims and are using combination arguments to render the claims as obvious.

B. Nonobviousness . Notwithstanding the Examiner's and Boards suggestion, a restructuring of references is not within the purview of obviousness. The Board's attempt to dismiss this issue with the unsupported arguments that the skilled artisan would have known how to do and try and justify their arguments with generalities and indefinite statements are bootstrap arguments. Mr. Toughey, the owner of Touchfax, the company that the BPAI to cites as having major prior art *(Exhibits C, D, E and F)* rendering Mettke's claims obvious, stated in a deposition that his companies terminals did not have the capability to access the Internet prior to the date of the applicant's disclosure in *January 25, 1995* He also goes on to state that as of the date of his deposition on *June 16, 1998, no* Touchfax terminals had Internet capability. This is almost three and half years after Mettke's disclosure The BPAI then goes on to say that because, "The TouchFax is designed to emulate exactly what a person will be able to use in their homes, says Massey, Exhibit E p

provides a suggestion to add Internet access to a pay-for-use terminal, when Internet access is common in homes". This statement should not be is given any weight in the BPAI's argument. It is a vague and infinitive. Yet they quote it. People have coffee pots in their homes, so are all coffee vending machine patents invalid? Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so," ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 221 USPQ 929 (Fed.Cir 1984); In re Fritch, 972 F.2d 1260, 23 USPQ2d 1780 (Fed Cir. 1992). The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. In re Gordon, 733 F 2d 900, 221 USPQ 1125 (Fed.Cir 1984), "The references fail to suggest any motivation for, or desirability of, the combination proposed by the Examiner, and the suggestion to combine all of the pieces of prior art appears to be based entirely on applicant's own disclosure As this Court has cautioned repeatedly," it is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious. " In re Gorman, 933 F.2d 982, 18 USPQ2d 1185

(Fed Cir. 1991), In re Fritch, 972 F 2d, at 1266 See also In re Fine, 837 F. 2d 1071, 5 USPQ2d 1596 (Fed.Cir 1988), "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention" In an effort to create motivation for the combination rendering. Mettke's claims obvious, the Board has made unsupported and non-substantive arguments that combining 11 pieces of prior art (three different ways) was obvious at the time The BPAI has failed to provide any clear motivation whatsoever for the proposed combination of features from the different references, and they cannot create such motivation by arguing blue printing and bootstrap arguments that one skilled in the art would know how to do it. This is a clear case of impermissible hindsight reconstruction.

E. Analogous Art The Board stated description of the invention is that it appears to be best defined as pay-for-use public communication terminals because the '905' patent discloses a pay-for-use public access terminal for communicating with commercial online service providers and Internet providers and *because* the '905' patent application as originally filed also disclosed that the terminal would send and receive facsimiles and e-mails The particular problem with which Appellant was concerned in claim 6 was a pay-per-use public communication terminal for

providing access to the Internet. Mettke's invention is best described as an "internet kiosk (or terminal)" Mettke respectfully disagrees that the terminals listed above (Exhibits C, D, E, F, L&G ISDN console) are within the field of endeavor (nor are they pertinent) to the matter at hand. They are *not* analogous art. None solve the problem of accessing the Internet or interface as the applicant's claims represent. If the terminals accessed the Internet (the problem that the applicant solves), and/or allowed for interface on a point-of-sale basis, then they may have been pertinent and relate to the applicants field of endeavor. The BPAI use of "Public Communications" terminal is too broad as a field of endeavor. Communication relates to many sub areas, facsimile machines, telephones, televisions, cellular phone and GPS's just to mention some of the areas. A more narrowed (and correct) field of endeavor would have been "Internet" If the proper field of art were used, it would have negated the BPAI's analysis and decision

## CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Mettke has shown beyond a doubt that the BPAI conducted a faulty analysis and interpretation of the prior art, erroneously and improperly used prior art in combination, did not give the proper weight to secondary evidence for patentability, added evidence to the closed record, relied on their own flawed technical expertise and improperly stated the analogous art and field of

endeavor. The BPAI used impermissible hindsight, a blue print to obvious methodology and boot strap arguments to render Mettke's claims obviousness. It is respectfully submitted that the decision of the Board is clearly erroneous and that it should be reversed

Respectfully Submitted,

Dated: 12/26/08

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-1125
(Serial No. 09/134,831)

IN RE RICHARD P. METTKE

Appeal from the United States Patent and Trademark Office, Board of Patent Appeals and Interferences.

## O R D E R

NOTE: This order is nonprecedential.

# UNITED STATES COURT OF APPEALS FOR THE

# FEDERAL CIRCUIT

## ORDER

Before Michel, Chief Judge, Newman, Circuit Judge, and Lourie, Circuit Judge.

A petition for rehearing having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee,

UPON CONSIDERATION THERE OF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED. The mandate of the court will issue on August 24, 2009.

FOR THE COURT,

Jan Horbaly Clerk

cc:Richard P. Mettke

Raymond T. Chen

In Re Mettke, 2009-1025 (PTO - 09/134,831)

# United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.
Washington, D.C. 20439

Jan Horbaly
Clerk of Court
August 24, 2009

202-633-6550
202-633-9623 (F)

RE: IN RE METTKE, 2009-1125

Dear Mr. Mettke

Your recently submitted [Appellant's Petition for En Banc Panel Rehearing] cannot be filed for the following reason(s):

If a party chooses to file both a petition for panel rehearing and a petition for a rehearing en banc, then the two must not be filed separately, they must be combined. Fed. Cir. R. 35(d)

The paper is: Returned to you herewith.

If you should have any questions or need assistance, please contact the Clerk's Office

Very truly yours,

Jan Horbaly, Clerk By. James Benjamin

Deputy Clerk

cc: Raymond T. Chen, Esq.

Enclosure

# APPELLANT'S PETITION FOR PANEL REHEARING

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 2009-1125

IN RE RICHARD P. METTKE

v.

THE UNITED STATES PATENT AND TRADEMARK OFFICE

RICHARD P.METTKE, Pro Se
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(614) 861-1847 (TELEPHONE)
(614) 458-6446 (FACSIMILE)
rmettke@aol.com

# CERTIFICATE OF INTEREST

RICHARD P. METTKE, Pro Se certifies the following:

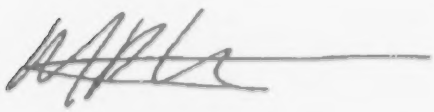
The full name of the party represented is: Richard P. Mettke.

The name of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A

The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are: None

The names of all law firms and the partners or associates that appeared for the parties or amicus now represented by me in the tria court or are expected to appear in this court are: None

RICHARD P.METTKE, Pro Se



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Attachments —

A-1 Shah Abstract- Suggestions for Information Kiosk Systems

Using the World Wide Web

A-2 United States Court of Appeals for the Federal Circuit

Decision, dated June 25, 2009, 2009-1125

STATUTES AND OTHER AUTHORITIES

Statutes-
35 U.S.C. §103 Authorities-

United States Court of Appeals for the Federal Circuit Rules of Practice, dated I May 2008

# STATEMENT FOR PANEL REHEARING CONSIDERATION

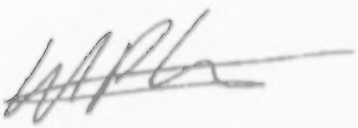
Based on my professional judgment, I believe the panel decision is contrary to the following Statues and Authorities:

- 35 U.S.C. §103
- United States Court of Appeals for the Federal Circuit Rules of Practice, dated 1 May 2008

Based on my professional judgment, I believe the proceeding involves two questions of exceptional importance that conflict with 35 U.S.C. §103 and the United States Court of Appeals for the Federal Circuit Rules of Practice, dated 1 May 2008

35 U.S.C. §103 Conflict- Obviousness. The court seriously misapprehended the meaning and substance of the Shah Abstract in determining that the Shah Abstract teaches accesses to the Internet. This was the principal relied on prior art that the court ruled (in combination) made the application obvious. The Shah explicitly teaches away from accessing and interfacing with the Internet .

United States Court of Appeals for the Federal Circuit Rules of Practice, dated 1 May 2008 conflict- The rules of practice state that an appellant is normally allowed to conduct an oral argument. The appellant filed a six page motion requesting oral argument. His motion was denied without comment.



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## FACTS MISAPPREHENDED BY THE COURT

Appellant moves for panel rehearing with oral arguments because the decision of the panel is contrary to current Statue and Authority in holding that reissue application 09/134,831 was obvious in view of Shah (in combination). The Panel apparently misapprehended the meaning and substance of the Shah Abstract. Shah teaches away from accessing the Internet. The Shah art should not be used as a prior art rendering the applicants application as obvious in combination with exhibits E& F. The Shah abstract does not teach accessing or interfacing with the Internet. The Shah teaches using a "World Wide Web" type browser on a standalone network. The Shah article teaches using a "World Wide Web style browser" on a standalone or networked (not to the Internet). If, the appellant would have been allowed to present oral arguments, this misapprehension would not have occurred. We will never know.

Mettke was denied oral arguments, denying him due process, contrary to the Courts rules of practice that states that an appellant is normally allowed to conduct an oral argument. The appellant filed a six page motion requesting oral argument His motion was denied without comment. This was a monumental case going through a prosecution of the reissue for over 10 ten years. The judicial appendix was over 800 pages. It is the American way to allow for due process.

## BACKGROUND

On January 23, 1995, Mettke applied for a patent directed to an "On-Line Communication Terminal/Apparatus." This application matured into the '905 patent, which issued on February 11, 1997. On August 17, 1998, Mettke applied for reissue of the '905 patent pursuant to 35 U.S.C. §251. The examiner rejected the new claims and Mettke filed an appeal to the BPAI, and the board affirmed the examiner's rejections and also entered a new ground of rejection for obviousness on August 31, 2006. Mettke filed a Request for Continued Examination The Examiner maintained the rejections in Appeal 2006-0625. Mettke filed an appeal with the BPAI that was affirmed on September 30, 2008. Mettke then filed an appeal to this court on December 26, 2009 The court affirmed the BPAI on June 25, 2009.

## DISCUSSION

**35 U.S.C. §103 conflict- Obviousness.** The court said in its decision that the Shah abstract "explicitly" describes access to the internet. Mettke agrees that it does discuss the internet; the discussion of the internet is <u>not</u> related to what his article is about, <u>kiosk based information systems with a World Wide Web design as an interface</u> The entire Shah abstract (4 '1/2 pages) needs to be read and interpreted as a whole, not just the first few introductory paragraphs It is clear that the Shah explicitly teaches "away" from accessing the Internet, and only wants to use the ***"Interface or web browser"***

popularized on the Internet in the stand-alone Kiosks he describes. The first paragraph of the "Shah" article calls out that the systems that he is referencing are ***"kiosk based".*** The second paragraph talks about how the Internet's World Wide Web has provided the internet with ***easy interface*** **(emphasis added).** The third paragraph talks about the requirements that that an ***information kiosk system based*** upon the World Wide Web "design" must have Hence, it talks about a Kiosk-based information system "based "upon the World Wide Web in the "context "of a type of ***user interface*** (emphasis added) to be used in a "standalone" kiosk information system. **Not** accessing the Internet. The other 4 pages talk about the functions and operability of the "Shah" kiosk-based information system. These pages include detail about **functions and operability** of the "Shah" kiosk-based information system to include· ***The Access Interface, Physical Requirements, User Interface Program, The Server, Storage and Transfer, Security*** and ***Control.*** Nowhere in these pages; the "meat" of the "Shah" article, is access or interface to the Internet mentioned. In the **Server** paragraph it clearly and explicitly indicates that the kiosk-based system is on a *closed network, not the internet.* In the aforementioned paragraphs, Shah would have stated clearly that his system accessed and interfaced with the Internet if that was his intent. He does not. The *Shah* art should not be used as a prior art rendering the applicants application as obvious in combination with exhibits E & F. Mettke is unsure how the panel could say that the Shah explicitly states that his kiosk based information system accesses and interfaces with the Internet. Had Mettke been given the opportunity to present **oral arguments,** this issue would have been cleared up and the BPAI would have been reversed. The Shah abstract is attached with mark-up's to assist

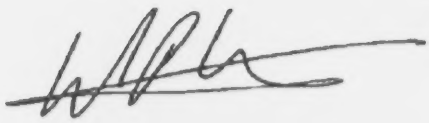
with an interpretation. I urge the panel to read this article as a "stand-alone" document, away from the haze of the 800- page judicial appendix. You will see that Mettke is correct

**United States Court of Appeals for the Federal Circuit Rules of Practice, dated 1 May 2008 conflict- Denial of oral arguments.**

The rules of practice state that an appellant is normally allowed to conduct an oral argument. The appellant filed a six page motion requesting oral argument. His motion was denied without comment. This at0s was an important case The patent is potentially worth more than 100 million dollars Whether or not the court felt that a Pro Se appellant could present the facts of the case should not have mattered. The court has granted Oral arguments to other Pro Se appellants, why not Mettke? Mettke feels that his due process has been torpedoed. Litigants should have the opportunity to present their case fully to a court Denial of this right, given the issues in this dispute is an abuse of discretion and was violative of both the letter and spirit of due process. Cold words on a printed page are not the same as a live presentation. Mettke should have been given the opportunity for an oral argument.

## CONCLUSION

The Court should rehear this appeal with oral arguments based on the aforementioned issues. Anything other than a rehearing would be an injustice to the independent American inventor.



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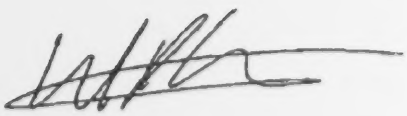
# CERTIFICATE OF SERVICE

I hereby certify that this request for a Rehearing is being served on the Commissioner of Patents and Trademarks by depositing two copies of the same with the United States Postal Service as Priority mail, postage prepaid, in an envelope addressed to:

Office of the Solicitor
P.O. Box 15667
Arlington, Virginia
22215

On June 29, 2008.



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NOTE: This order is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

2009-1125

(Serial No. 09/134,831)

IN RE RICHARD P METTKE

Appeal from the United States Patent and Trademark Office, Board of Patent Appeals and Interferences.

**ON MOTION**

**ORDER**

Appellant Richard P. Mettke moves unopposed to present oral argument. Upon consideration thereof,

IT IS ORDERED THAT: The motion is denied. The case will be submitted on the briefs without oral argument on June 2, 2009

FOR THE COURT

Jan Horbaly

Dated: May 18, 2009

Jan Horbaly

Jan Horbaly, Clerk

FILED

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MAY 18 2009

# IN RE METTKE

Appeal No. 2009-1125

## APPELLANT MOTION REQUESTING TO PRESENT ORAL ARGUMENTS

Appellant, Richard Mettke strongly requests that he be given the opportunity to present oral arguments on the merits of his case before the Unites States Court of Appeals for the Federal Circuit. This reissue case has been in the USPTO labyrinth for over 10 years. Mettke feels in this time, the USPTO has taken the prosecution down an improper path that can best be demonstrated and highlighted in person during oral arguments. The Judicial Appendix is over 800 pages and a bit cumbersome. Mettke believes that during oral arguments he can quickly summarize the facts of the case and matters of law that will result in a reversal of the USPTO's decision. Some of these facts and matters of law of law include:

• The gross *misinterpretation* of the "principal" relied on prior art (in combination with Exhibits E & F), *Shah*. The USPTO relied on their own flawed technical expertise to justify their interpretation of the *Shah* abstract The *Shah* abstract talks about a Kiosk-based information system "based "upon the World Wide Web in the "context "of a type of *user interface* (emphasis added) to be used in a "stand-alone" kiosk information system, *not* accessing the Internet.

• The BPAI improperly pulled *prior art* back in to the case which had been reviewed and ruled out by the Examiner as prior art that would negate a reissue. This prior art was reviewed in the same *context* by the BPAI (Exhibits C, D and L&G ISDN console). The BPAI failed to say why and how the Examined erred in her review and decisions.

• The BAPI improperly added material *(Internet Navigator, Aliens,* and *On Haiti)* to the "closed" record, and conducted research, i e Wikipedia and then relied on their flawed technical expertise This is beyond their purview. This is akin to jurors sitting on a jury trial, after receiving all of the evidence on a case and then sent in for deliberations; going out and finding their own evidence. A mistrial would have been declared.

Mettke's claims, in January 1995, would not have been a" predictable variation that person of ordinary skill in the art could implement" without the benefit of seeing Mettke's disclosure. This is evidenced by the statements by the owner of terminals in Exhibits E and F, where he states the terminals did not have the capability to access the Internet as of the date of his deposition, *June 16, 1998, no* Touchfax terminals had the capability to access and interface with the Internet.

- The Patent Office incorrectly states the level of ordinary art at the time if disclosure. This is also evidenced by the above paragraph where the owner of terminals in Exhibits E and F (as well as owner of exhibits C&D), states the teiminals did not have the capability to access the Internet as of the date of his deposition, *June 16, 1998, no* Touchfax terminals had the capability to access and interface with the Internet. This is almost *3 /2 years* after Mettke disclosure.

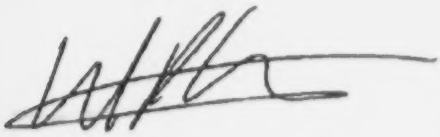
- Hindsight and Blue printing. The BPAI used impermissible hindsight, a blue print to obvious methodology and boot strap arguments to render Mettke's claims obviousness. In an effort to create motivation for the combination

rendering Mettke's claims obvious, the Board has made unsupported and non-substantive arguments that combining 11 pieces of prior art (three different ways) was obvious at the time of Mettke's disclosure. The BPAI has failed to provide any substantive motivation whatsoever for the proposed combination of features from the different references. They cannot create motivation by blue printing and bootstrap arguments that one skilled in the art would know how to do it. The Board substituted its own expertise for record evidence The Board's finding that an artisan would have known how to put together all of the elements of isolated pieces of prior art to render the Mettke claims obvious is at best a case of blue printing and hindsight.

- Mettke's objective evidence of "nonobviousness" is persuasive! Mettke provided enough information of secondary evidence of non-obviousness and a nexus related to his claims. And if he did not, the Patent office was obligated to conduct further research to validate his claims. The BPAI, throughout the review of Mettke's reissue prosecution took the time to conduct research outside of the record and insert it into the record. How can they then cite case law that says "The burden of proving a nexus is on the applicant."

• Field of endeavor. The Patent Office's arguments citing that the references are analogous and are in the same field of endeavor are bootstrap arguments. Mettke's invention is best now described as an "internet kiosk (or terminal)" Mettke respectfully disagrees that the terminals listed above (Exhibits C, D, E, F, L&G ISDN console) are within the field of endeavor (nor are they pertinent) to the matter at hand. They are *not* analogous art. None solve the problem of accessing the Internet or interface as the applicant's claims represent. The BPAI use of "Public Communications" temlinal is too broad as a field of endeavor Communication terminals can relate to many sub areas, facsimile machines, telephones, televisions, cellular phones and Global Positioning Systems just to mention some of the areas Based on the above, the Appellant respectfully requests that this motion requesting to present oral arguments be granted.

Respectfully submitted,



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V

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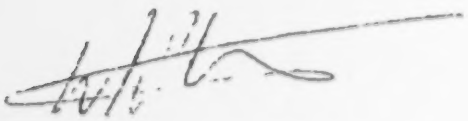

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# United States Patent [19]

Mettke

[11] Patent Number: 5,602,905

[45] Date of Patent: Feb. 11, 1997

[54] **ON-LINE COMMUNICATION TERMINAL/APPARATUS**

[76] Inventor: **Richard P. Mettke**, 620 Shannahan Dr., Weaver, Ala. 36277

[21] Appl. No. 376,247

[22] Filed Jan. 23, 1995

[51] Int. Cl.[6] ..... H04M 11/00

[52] U.S. Cl. ..... 379/96; 379/91

[58] Field of Search ..... 379/100, 91, 96, 379/97, 98, 93, 94, 144, 155; 358/401, 442, 235/380, 381, 382, 364/401, 408

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*Primary Examiner*—Curtis Kuntz
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[57] **ABSTRACT**

A "pay-as-you-use" communication terminal capable of interfacing with all major commercial on-line communications services (I.E. American On-Line, Prodigy, CompuServe, Genie, Delphi, Eworld). Users can receive a hard copy of any activity that they conduct from the terminal through the co-located printer. Payment of services will be made by credit card, using a "magnetic swipe" system included as part of the terminal system. Users will be charged for use of the system as well as normal telephone charges.

5 Claims, 1 Drawing Sheet

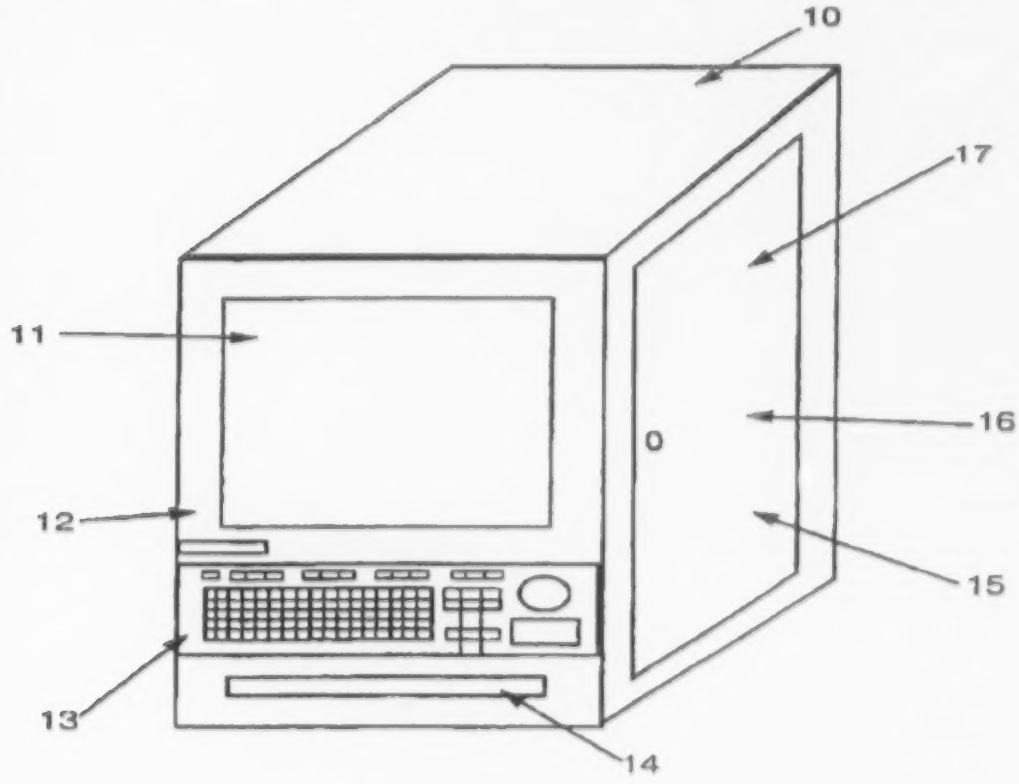


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Figure 1

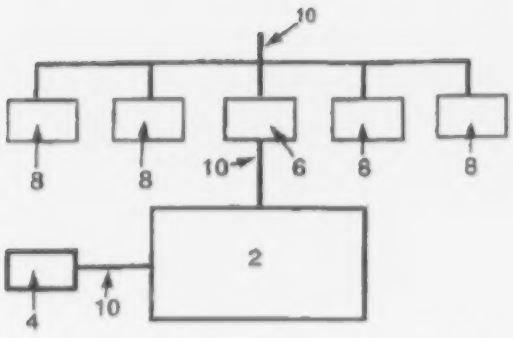
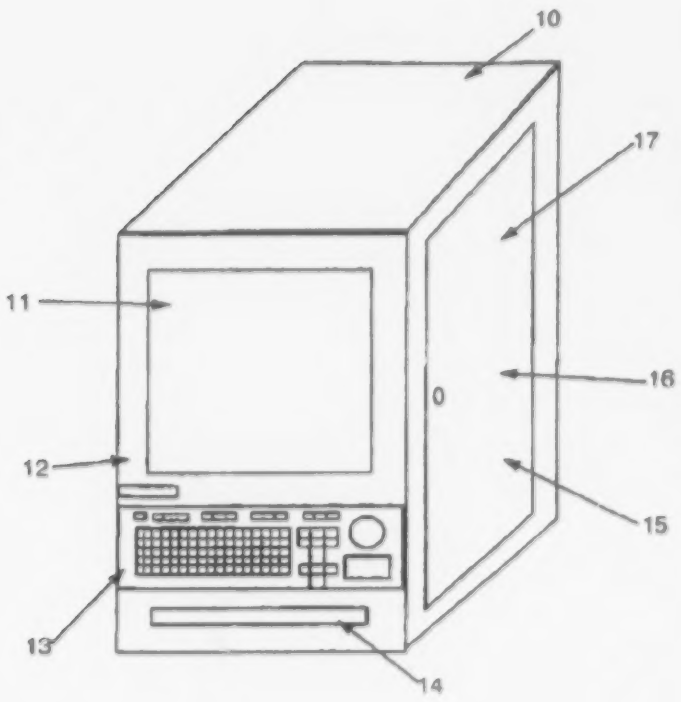



Figure 2



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# ON-LINE COMMUNICATION TERMINAL/APPARATUS

## BACKGROUND—FIELD OF INVENTION

This invention relates to an electronic pay-as-you-use message terminal/apparatus capable of interfacing with all major commercial on-line services

## BACKGROUND—DESCRIPTION OF PRIOR ART

In the past few years there has been a remarkable growth in the use of commercial on-line service providers (I E PRODIGY COMPUSERVE, AMERICAN ON-LINE, and DELPHI) machines The use of the above listed services are normally conducted in the home or office

Individuals and businesses constantly draw from the wealth of data bases of information available from the commercial on-line services Commercial on-line members also access the services for personal and leisure activities (I E play games, news or sports updates, weather reports, shopping, traveling, browsing ETC ) These services are generally accessed from fixed site locations at home or in the office Although, portable terminals (lap top computers) with modems are available, they are often cumbersome and are not user friendly for a travelling business people or other users of commercial on-line services on the road.

There are various devices/apparatuses for conducting the operations/applications described previously There is however, no one device/apparatus that brings these operations/applications together and offers their use on a pay-as-you-use basis A listing of known prior art

- U.S Pat No 4,092,527—A calculator with interchangeable keyboards having different preselected configurations of numeric and/or function keys
- U.S Pat No 4,274,081—A data input apparatus including a keyboard and plurality of interchangeable mats which define the function of the 39 keyboard keys
- U.S Pat No 4,374,381—A touch terminal which communicates and controls a microprocessor
- U S Pat No 4,482,955—A keyboard having an on board microprocessor for controlling keyboard functions
- U S Pat No 4,660 218—Automatic switch apparatus for automatically switching between a telephone set and a terminal device
- U S Pat No 5,334,823—Systems and methods for operating Data card terminals for transaction chargeback protection
- U S Pat No 5,235,680—Apparatus and method for communicating textual and image information between a host computer and remote display terminal

As stated previously, the above cited prior art devices/apparatuses have provided the majority of the technical applications/capabilities for this on-line terminal, however none are brought together to provide for the pay-as-you-use applications/capabilities of this device/apparatus

Accordingly, there is no one device/apparatus that allows a user, to access, on a pay-as-you-use basis, a commercial on-line service on an interactive basis The terminals would be located in such diverse locations as airports, hotels, business centers, libraries, hospitals, shopping malls and other locations as appropriate

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## SUMMARY OF THE INVENTION

The present invention disclosed herein comprises a system for accessing commercial on-line services on a pay-as-you-use basis The system includes a Central Processing Unit (CPU), internal modem, monitor, printer, credit card reading swipe device and housing Accordingly, besides the objects and advantages of this device/apparatus described previously in my application, several objects and advantages are (some restated)

(a) Users can conveniently access commercial on-line services and the Internet at other locations other than from their fixed terminal at an office or home

(d) Users can receive a hard copy document from a laser printer of any activity that they conduct at the terminal

(e) Users will pay for the use of the terminal using a credit card swipe apparatus The user will be charged for use of the terminal, telephone line use charges and additional charges by the commercial on-line service or internet provider

(f) Commercial on-line services will benefit greatly by the additional exposure/access of their services

(g) Users will have the convenience of having easy access to the services provided by the terminal at a reasonable price, negating the need for frequent travelers to unnecessarily carry around a cumbersome laptop terminal with accessories for conducting on-line activities

## BRIEF DESCRIPTION OF THE DRAWINGS

FIG 1 A typical functional embodiment is schematically illustrated by block diagram form in FIG 1

FIG 2 A typical embodiment of the terminal is illustrated in diagram form in FIG 2

## DETAILED DESCRIPTION OF THE INVENTION

A typical functional embodiment is schematically illustrated by block diagram form in FIG 1 Numeral 2 generally indicates the Terminal device which is comprised of the monitor, keyboard w/mouse, central processing unit w/internal modem (14 4–28 BPS), integrating software, laser printer, credit card swiping device, telephone and telephone lines Numeral 4 generally indicates the credit card processing service/center Numeral 6 generally indicates the local telephone node/switching node Numeral 8 generally indicates the feeder/access nodes for the commercial on-line service/Internet provider Numeral 10 generally indicates the servicing telephone line

"A typical embodiment of the terminal is illustrated in FIG 2 Numeral 10 generally indicates the housing for the terminal Numeral 11 generally indicates the monitor Numeral 12 generally indicates the credit card reader swipe device Numeral 13 generally indicates the keyboard Numeral 14 generally indicates the printer paper discharge chute Numeral 15 generally indicates the location of the printer behind the terminals access door Numeral 16 generally indicates the location of the CPU with internal modem behind the terminals access door Numeral 17 generally indicates the location of the access door"

"A representative CPU with internal modem, monitor and printer could be of the IBM AST series A representative touch screen with controller could be of the series manufactured by Interaction Systems A representative credit card reader could be the MAGTEK 21055002

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Interconnection and operatability of the components is not discussed in greater detail since the technology is well known in prior art

Accordingly, the reader will see that this invention has unlimited potential and promise in this ever emerging information age The invention would be a convenience for business people and travelers providing easy access to on-line services that are quickly become the norm in day to day living While particular embodiments of this invention have been described for purposes of illustration, these involve no limitations and the invention may be carried into practice by persons skilled in the art in a variety of ways without departing from its spirit or from the ambit of the claims

I claim

1 A public on-line pay-as-you-use communications terminal comprising a housing wherein said housing contain

a central processing unit (CPU)

a telephone access node,

an internal modem coupled to the CPU and telephone access node,

a video display monitor coupled to the CPU,

a keyboard for providing user interface coupled to the CPU,

a credit card reader swipe device coupled to the CPU for accepting payment by a user for use of the terminal,

means for accessing commercial on line services and allow for user interaction,

software installed into the CPU to allow interface with commercial on-line service providers and credit card service centers,

a printer coupled to the CPU

2 The terminal in accordance with claim 1 wherein said means for accessing includes a touch screen interface attached to the monitor and further includes a touch screen means for accepting input information from said touch screen interface and modifying program execution accordingly

3 The terminal in accordance with claim 1 also including, within said housing, program means for causing said printer to print a receipt or any other document available from a commercial on-line service

4 The terminal in accordance with claim 1 wherein said housing includes a durable enclosure for the CPU, monitor, internal modem and printer, and a secured access door for service and repair

5 A method of using a public on-line, pay-as-you-use terminal to access commercial on-line services comprising the steps of

swiping a credit card through a credit card swipe device, if credit is is denied disallowing interaction, if credit is approved, receiving charge approval from a credit card center for use of the terminal, communicating said approval to CPU executing a main program in response to input from a user who is responding to a selection of on-line services that are assessable and displayed on a monitor in communication with said CPU and, based on interaction between said user and said main program, controlling switching means with said CPU to provide communication between a telephone access node and a modem with a commercial on-line service, printing with a printer a hard copy of documents said user requires, said printer being in communication with the CPU, deactivating said CPU from commercial on-line service user interaction on appropriate input from said user; printing with said printer a billing statement

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